Supreme Court, U.S.
FILED
94 344 AUG 2 2 1994
OFFICE OF THE CLERK

NO:_____

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1994

JAMES RICHARD COPE and
ROY CARTER BRIEN, individually; and
as representatives of a class; and
JAMES V. MARCUM, individually,
Petitioners,

V.

REVENUE CABINET
COMMONWEALTH OF KENTUCKY,
Respondent.

Petition for Writ of Certiorari to the Supreme Court of Kentucky

Co-Counsel
For Petitioners:
DOUGLAS C. BRANDON
J. BRENT AUSTIN
SUITE 312, VICTORIAN SQ.
410 W. MAIN STREET
LEXINGTON, KY 40507

JOHN MARION WILLIAMS*
501 PRICE BLDG.
ASHLAND, KY 41101
*COUNSEL OF RECORD

JAMES V. MARCUM
125 BUENA VISTA DRIVE
ASHLAND, KY 41101
COUNSEL FOR
PETITIONERS

The Printing Press, Ltd. (304) 744-7949 P.O. Box 10186 Charleston, WV 25357

THE QUESTIONS PRESENTED

1. Whether the federal constitutional doctrine of inter-governmental immunity which protects the United States from state income tax discrimination against its federal pensioners, overrides Kentucky's Equal Protection responsibilities to shield its non-governmental pensioners from arbitrary and irrational income taxation, prohibited by the Fourteenth Amendment?

2. Whether a Kentucky statutory scheme for the taxation of pension income which exempts federal pensioners and coercively taxes non-governmental pensioners is irrational and without a valid state purpose, thereby denying Equal Protection of Kentucky's tax laws to said non-governmental pensioners, contrary to the Fourteenth Amendment?

3. Whether the mandate of a major federal statute, 4 U.S.C. Section 111, standing alone, excuses or justifies any such Equal Protection violations?

4. Whether such tax discrimination against non-governmental pensioners; is not "palpably arbitrary;" infringes upon their travel and migration rights; and improperly favors entrenched and politically powerful governmental pensioners and public employees, contrary to the Equal Protection Clause of the Fourteenth Amendment?

TABLE OF CONTENTS

The Questions Presented i

Parties to the Proceedings ii

Table of Authorities ..... v, vi, vii

Opinions Below 2

Jurisdiction 2

Constitutional and Statutory Provisions Involved 2

Statement 3

A. The Facts 3

B. The Proceedings Below 7

1. How the Fourteenth Amendment Equal Protection Issues Were Treated 7

2. How the Kentucky Supreme Court Treated the "Federal Pensioners sub-class." 10

Reasons for Granting Petition 13

I. The Federal Intergovernmental Immunity Tax Statute, 4 U.S.C. Section 111, Has Been Misapplied To Avoid Adjudicating The Equal Protection Rights of Kentucky's Non-Governmental Pensioners 13

II. This Honorable Court Should Re-emphasize That Congress Cannot By Legislation Direct That A State Violate Or Deny The Equal Protection Rights Guaranteed By The Fourteenth Amendment 14

III. The Classification Of The Federal Pensioners Into A Separate Sub-Class For Purposes of Granting A Kentucky Income Tax Exemption That Was Denied To Other Non-Federal Pensioners Was Irrational and "Palpably Arbitrary" Per Davis v. Michigan 16

IV. No Valid State Purpose Can Be Discerned By Kentucky's Exemption Of The Federal Pensioners Sub-Class, Rendering The Same Irrational 17

V. Other Attributes of Kentucky's Pension Tax Scheme Are Not In Accord With Equal Protection Principles, Indicating Further Reasons Why This Petition Should Be Granted 19

A. The Federal Pensioner sub-class is not a "discrete" group of select pensioners within the meaning of Justice Stevens' dissent in the Davis Case, infra 19

B. The Federal Pensioner sub-class is being rewarded solely for "past contributions" to the Federal government, a non-valid state purpose, per Zobel, supra, 457 U.S. 55 (1982) 20

C. The so-called "political check" sometimes relied upon to avoid undue federal interference in Equal Protection situations is ineffectual in Kentucky because of entrenched political forces and lobby groups 21

D. The "travel rights" and "rights to migrate" of the Non-Governmental Pensioners have been unconstitutionally impacted by Kentucky's pension tax scheme 22

VI. The Equal Protection Issues Presented In This Petition Are Important And Require Definitive Answers Which Only This Honorable Court Can Provide 22

CONCLUSION 25

APPENDIX A Opinion of Kentucky Supreme Court 1a

APPENDIX B Excerpts from Petition for Rehearing 11a

APPENDIX C-1 Judgment, Franklin Circuit Court rendered March 20, 1992 ..... 19a

APPENDIX C-2 Order, Franklin Circuit Court rendered October 7, 1992 ..... 27a

APPENDIX C-3 Order, Franklin Circuit Court, rendered December 23, 1992 ..... 34a

APPENDIX D Excerpts from Transcripts of legislative debates, Senate Bill 4, 1990 Kentucky General Assembly 36a

APPENDIX E Senate Resolution 196 1990 Kentucky General Assembly, Regular Session 54a

APPENDIX F Excerpts from Study by Legislative Research Commission 55a

APPENDIX G Pertinent parts of Constitutions and Statutes involved in this case 57a

TABLE OF AUTHORITIES

CASES:

Davis v. Michigan Dept. of Treasury, 489 U.S. 803 (1989) 3, 11-22, 25

Tabler v. Wallace, Ky., 704 S.W.2d 179 (1985) 8-10

Delta Airlines, Inc. v. Commonwealth Revenue Cabinet, Ky., 689 S.W.2d 14 (1985) 8,9

Brinkerhoff - Faris Trust Co. v. Hill, 281 U.S. 673 (1930) 9

Prunevard Shipping Center v. Robins, 447 U.S. 74 (1980) 9

McKesson v. Division of Alcoholic Beverages & Tobacco, 496 U.S. 18 (1990) 9

Allied Stores of Ohio, Inc. v. Bowers, 38 U.S. 522 (1959) 13

F. S. Royster Guano Co. v. Commonwealth of Virginia, 253 U.S. 412 (1920) 13,19

Shapiro v. Thompson, 394 U.S. 1322 (1969) 15

Katzenbach v. Morgan, 384 U.S. 641 (1966) 15

Reid v. Covert, 354 U.S. 1 (1957) 15

Washington State Com'l v. Tollefson, Wash, 571 P.2d 13 (1977) 15

Zobel v. Williams, 457 U.S. 55 (1982) 17, 19-20, 22

Hooper v. Bernalillo, County Assessor, 472 U.S. 612 (1985) 17, 19, 20

McGinnis v. Royster, 410 U.S. 263 (1973) 17

Attorney General of New York v. Soto-Lopez, 476 U.S. 898 (1986) 21, 22

Quaker City Cab Co. v. Commonwealth of Pennsylvania, 277 U.S. 389 (1928) 23, 25

City of Cleburne, Tex. v. Cleburne Living Center, 473 U.S. 432 (1985) 23, 26

CONSTITUTION:

Section 1, Amendment 14 United States Constitution 57a

STATUTES:

4 United States Code Sec. 111 .....57a

Kentucky Revised Statutes:

KRS 141.010 .....57a

KRS 141.021 (Senate Bill 4) 57a

KRS 141.235 .....58a

NO:_____

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1994

JAMES RICHARD COPE and
ROY CARTER BRIEN, individually; and
as representatives of a class; and
JAMES V. MARCUM, individually,
Petitioners,

V.

REVENUE CABINET
COMMONWEALTH OF KENTUCKY,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Kentucky

---

The Petitioners respectfully pray that a Writ of Certiorari issue to review the Judgment and Opinion of the Kentucky Supreme Court entered in the above-entitled proceeding on January 31, 1994, (rehearing denied May 26, 1994.)

OPINIONS BELOW

The Opinion of the Kentucky Supreme Court in the case below styled, James Richard Cope, et al v. Revenue Cabinet, Commonwealth of Kentucky, is printed at Appendix A, infra, 1a and is reported at 875 S.W.2d 87, Ky. (1994), styled Commonwealth, Revenue Cabinet v. Cope.

The Judgment of Franklin Circuit Court rendered on March 20, 1992 is printed at Appendix C-1, infra, 19a.

The Order of Franklin Circuit Court rendered on October 7, 1992 is printed at Appendix C-2, infra, 27a.

The Order of Franklin Circuit Court rendered on December 23, 1992 is printed at Appendix C-3, infra, 34a.

The Judgment and Orders of the Franklin Circuit Court are unreported.

JURISDICTION

The judgment of the Kentucky Supreme Court was entered on January 31, 1994. Petitioners' Petition for Rehearing was denied on May 26, 1994.

The jurisdiction of this Court to review the judgment of the Kentucky Supreme Court is invoked under 28 U.S.C. Section 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves Section 1, Amendment 14, United States Constitution, the "Equal Protection Clause" thereof; 4 U.S.C. Section 111, and Kentucky Revised Statutes (KRS) 141.010 et. seq., including 141.135, and 141.021 (Senate Bill 4). The pertinent parts of these Constitutions and Statutes are printed in Appendix G hereto, infra, 57a.

STATEMENT

A. THE FACTS

The Kentucky General Assembly in 1990 adopted a statutory tax scheme relating to the income taxation of pensions and "retirement annuities" which raise important federal Equal Protection and inter-governmental immunity issues that can only be resolved by a full consideration of this Honorable Court.

The essentials of the tax scheme are that the pension incomes and retirement annuities of public pensioners, (including retired civilian and military personnel of the United States), herein called the "Federal Pensioners sub-class" were exempted from Kentucky's six percent income tax, while the pension incomes and retirement annuities of the Petitioners, (who are non-governmental, private-sector pensioners), herein called, the "Non-Governmental Pensioners," were unfairly, deliberately and coercively subjected to such tax. Kentucky's discriminatory pension tax exemption scheme remains in effect to this very day.

Prior to 1990 Kentucky had over a period of years exempted all of its own state and local pensioners from its income tax. In 1989 this Court ruled in Davis v. Michigan Dept. of Treasury, 489 U.S. 803 (1989) that federal statute, 4 U.S.C. Section 111, applied to federal pensioners, as well as to federal employees. Michigan was therefore ordered to remedy all income tax discrimination against its resident federal pensioners, by providing them "equal treatment" with its own state pensioners.

In 1990, the Kentucky General Assembly, acting with reference to the Davis case, passed Senate Bill 4, which as subsequently codified, provided:

> KRS 141.021 (Senate Bill 4)
>
> Notwithstanding the provisions of KRS 141.010, federal retirement annuities, and local government retirement annuities paid pursuant to KRS 67A.320, 67A.340, 67A.360 to 67A.390, 79.080, 90.400, 90.410, 95.290 to 95.620, 95.621 to 95.629, 95.767 to 95.784 95.851 to 95.884, or 96.180, shall be excluded from gross income.

(Emphasis Added) App., infra, 57a.

The legislative history leading up to the passage of Senate Bill 4 (KRS 141.021) was well documented and is preserved by Transcripts of the legislative debates which are included in the trial record of this case. Pertinent parts of those debates which were used at trial and which are referred to by both the trial court and the Kentucky Supreme Court are exhibited herein at Appendix D, infra, 36a.

The Transcripts of the legislative debates indicate that Senate Bill 4 was inspired, in part, by this Court's ruling in the Davis case, supra, App., infra, 43a. The measure, however, was vigorously attacked from the outset as unfair, unequal and unconstitutional, "special-interest" legislation, which improperly discriminated against Non-Governmental Pensioners.

Floor Amendment No. 1 was immediately introduced to correct the blatant inequality by extending Senate Bill 4's tax exemption benefits to all Kentucky pensioners. The sponsor of Floor Amendment No. 1, Senator Art Schmidt, presented the basic Equal Protection issues, saying, as the trial court noted:

> "This Floor Amendment No. 1 goes along with the fairness and equity issue. . .it would exclude private pensions from state income tax, the same as government pensions would be excluded.
> . . .you can go across this state. . .with General Tire up to Ashland Oil, to the steel plants, General Motors, Ford, General Electric IBM. . .and it just wouldn't be fair to tax those people. . .to require them to pay a tax on their pension and then exclude someone else. . .so it is fairness and equity.
> . . .what is the difference between a secretary who works at a CPA's firm and a secretary who works in the Revenue Cabinet or the IRS?"
> (Emphasis Added) App., infra, 37a.

Based on the evidence of these legislative debates, the trial court, hereinbelow, also held the view that intensive lobbying efforts by special-interest groups of retired teachers, state

employees, state pensioners and retired federal, civilian and military pensioners may have impeded the legislative process.

The legislative debates glaringly reveal that the General Assembly itself was fully aware of the Equal Protection violations of Senate Bill 4. As the trial court commented:

> "It is evident that the legislature expected constitutional problems with Senate Bill 4, and it is equally evident that they responded to great pressure from federal and state employee groups in passing the measure. . . .Chairman Clarke of the House Appropriations and Revenue Committee, recognizing the lack of a real economic or social basis for the measure, stated: 'We're probably going to get sued by private retirees anyway. . . .' Transcript II, p. 7."
> (Emphasis Added) App., infra, 29a.

The trial court further called attention to the cogent comments of Senator Williams who gave a persuasive and pertinent reason for the denial of Equal Protection to the Non-Governmental Pensioners. He said:

> "I'd submit to you, Members of the Body, that the reason that they're not going to be treated the same. . .is because they don't have the same political influence, those other pensioners out there don't, the political retirees and state employees and public officials have presently. I think that the thing throughout this entire session, up to this point, is that let's treat those with political influence differently. . . ." (Emphasis Added) App., infra, 30a.

The significance of the legislative debates concerning the denial of Equal Protection to the Non-Governmental Pensioners impressed the General Assembly itself, as well as the trial court. Senate Resolution 196 which was adopted near the close of the 1990 legislative session, candidly admits that,

> "The General Assembly took action during this Session that will affect only a portion of those retired persons in our state"

Notwithstanding, that,

> "it is the intention of the General Assembly and of the Commonwealth to provide fair and equitable treatment through taxation to all retired persons residing in our State."
> (Emphasis Added) App., infra, 54a.

Senate Resolution 196 also ordered the Legislative Research Commission to prepare a Study of the fiscal and economic impact of Kentucky's pension tax scheme. This Study as reported to the 1992 General Assembly estimated the revenue and tax impacts as follows:

	Millions Per Year	**%**
Revenues lost by exemption of state and local pensioners	$6.64	28%
Revenues lost by exemption of federal pensions	$17.30	72%
Total Lost Revenues	$23.94	100%
Revenues collected from non-governmental pensions	$52.33	

(See Table I to Appendix F, infra, 55a.)

The Transcripts of the debates of the General Assembly demonstrate without question that the inclusion of the Federal Pensioner sub-class into Kentucky's pension tax exemption scheme, and the exclusion of the similarly situated Kentucky

pensioners who had not retired from a governmental employment, was done deliberately and without any bona fide reason, solely to appease the state and federal employee lobby groups, and the entrenched political forces which those lobbies represent. All of these lobby groups filed amicus briefs hereinbelow strongly supporting Senate Bill 4, supra, page ii.

The Franklin Circuit Court, which tried this case, summed up its findings in a sound and well precedented Opinion by simply stating:

> "This taxation scheme takes a natural class pensioners, and divides it for no substantial reason." App., infra, 25a.

B. THE PROCEEDINGS BELOW

1. How the Fourteenth Amendment Equal Protection Issues Were Treated

Following the passage of Senate Bill 4, codified as KRS 141.021, by the 1990 General Assembly, the Petitioners, all of whom are residents of Kentucky who receive Non-Governmental Pensions, filed an action herein seeking a Declaration of Rights, injunctive relief and restitution. App., infra, 1a. The cause of action was described by the Franklin Circuit Court, the trial tribunal herein, as follows:

> "Plaintiffs assert that the provisions of KRS 141.021, as they exempt pension benefits received by citizens and residents of the Commonwealth of Kentucky from state and federal governmental sources from inclusion in 'gross income' while including plaintiffs' private pensions are unconstitutional. . . .Plaintiffs contend that KRS 141.021 violates the 14th Amendment equal protection clause of the United States Constitution, and also violates Sections 1, 2, 3, 26 and 59 of the Kentucky Constitution."
> (Emphasis Added) App., infra, 19a.

In resolving the Equal Protection issues, the Franklin Circuit Court observed, that Kentucky Constitution, Sections 1, 2, 3 and 26 "create protections similar to that of the Equal Protection Clause...," (App., infra, 20a.), and went on to hold Senate Bill 4 unconstitutional by reason of Section 59 of the Kentucky Constitution, citing the Kentucky rule established in Tabler v. Wallace, Ky., 704 S.W.2d 179 (1985) to the effect that, "Section 59 provides broader protection than the federal equal protection clause."

It should be noted that the Kentucky Supreme Court in the case at bar specifically overruled the Franklin Circuit Court, holding that Petitioners had not been denied the benefits of Sections 2 and 3 of the Kentucky Constitution. (App., infra, 8a). Consequently, by direct inference, and following its own holding in Tabler, supra, that Sections 1, 2 and 3 of Kentucky's Constitution "embrace the Equal Protection clause," the Kentucky Supreme Court has decided that the Equal Protection Clause of the Fourteenth Amendment does not apply to these Petitioners.

The Kentucky Supreme Court, however, did not leave the federal Equal Protection issues to be disposed of by inference alone. Kentucky's highest court specifically decided the question by saying:

> "Finally in the discussion of our leading decisions, reference should be made to Delta Airlines, Inc. v. Commonwealth Revenue Cabinet, Ky., 689 S.W.2d 14 (1985), wherein the Court recognized the broad discretion of the General Assembly to classify taxpayers. We held that classification standards in Kentucky are the same as those under the Fourteenth Amendment to the Constitution of the United States and that economic factors may be validly considered by the Legislature in developing tax classifications. (Emphasis Added) App., infra, 3a.

In a footnote, the Court concluded:

> "Delta Airlines, Inc. v. Commonwealth Revenue Cabinet, Ky., 689 S.W.2d 14 (1985), would

pensioners who had not retired from a governmental employment, was done deliberately and without any bona fide reason, solely to appease the state and federal employee lobby groups, and the entrenched political forces which those lobbies represent. All of these lobby groups filed amicus briefs hereinbelow strongly supporting Senate Bill 4, supra, page ii.

The Franklin Circuit Court, which tried this case, summed up its findings in a sound and well precedented Opinion by simply stating:

> "This taxation scheme takes a natural class pensioners, and divides it for no substantial reason." App., infra, 25a.

B. THE PROCEEDINGS BELOW

1. How the Fourteenth Amendment Equal Protection Issues Were Treated

Following the passage of Senate Bill 4, codified as KRS 141.021, by the 1990 General Assembly, the Petitioners, all of whom are residents of Kentucky who receive Non-Governmental Pensions, filed an action herein seeking a Declaration of Rights, injunctive relief and restitution. App., infra, 1a. The cause of action was described by the Franklin Circuit Court, the trial tribunal herein, as follows:

> "Plaintiffs assert that the provisions of KRS 141.021, as they exempt pension benefits received by citizens and residents of the Commonwealth of Kentucky from state and federal governmental sources from inclusion in 'gross income' while including plaintiffs' private pensions are unconstitutional. . . .Plaintiffs contend that KRS 141.021 violates the 14th Amendment equal protection clause of the United States Constitution, and also violates Sections 1, 2, 3, 26 and 59 of the Kentucky Constitution."
> (Emphasis Added) App., infra, 19a.

In resolving the Equal Protection issues, the Franklin Circuit Court observed, that Kentucky Constitution, Sections 1, 2, 3 and 26 "create protections similar to that of the Equal Protection Clause...," (App., infra, 20a.), and went on to hold Senate Bill 4 unconstitutional by reason of Section 59 of the Kentucky Constitution, citing the Kentucky rule established in Tabler v. Wallace, Ky., 704 S.W.2d 179 (1985) to the effect that, "Section 59 provides broader protection than the federal equal protection clause."

It should be noted that the Kentucky Supreme Court in the case at bar specifically overruled the Franklin Circuit Court, holding that Petitioners had not been denied the benefits of Sections 2 and 3 of the Kentucky Constitution. (App., infra, 8a). Consequently, by direct inference, and following its own holding in Tabler, supra, that Sections 1, 2 and 3 of Kentucky's Constitution "embrace the Equal Protection clause," the Kentucky Supreme Court has decided that the Equal Protection Clause of the Fourteenth Amendment does not apply to these Petitioners.

The Kentucky Supreme Court, however, did not leave the federal Equal Protection issues to be disposed of by inference alone. Kentucky's highest court specifically decided the question by saying:

> "Finally in the discussion of our leading decisions, reference should be made to Delta Airlines, Inc. v. Commonwealth Revenue Cabinet, Ky., 689 S.W.2d 14 (1985), wherein the Court recognized the broad discretion of the General Assembly to classify taxpayers. We held that classification standards in Kentucky are the same as those under the Fourteenth Amendment to the Constitution of the United States and that economic factors may be validly considered by the Legislature in developing tax classifications. (Emphasis Added) App., infra, 3a.

In a footnote, the Court concluded:

> "Delta Airlines, Inc. v. Commonwealth Revenue Cabinet, Ky., 689 S.W.2d 14 (1985), would

> exempted class utterly invalidated appellant's argument with respect to a rational legislative basis for the exemption. Upon review of the legislative history of Senate Bill 4, codified as KRS 141.021, we are convinced that the sole and exclusive motivation for the inclusion of federal retirees was the decision of the Supreme Court of the United States in Davis v. Michigan, 489 U.S. 803, 109 S.Ct. 1500, 103 L.Ed.2d 891 (1989), which held, pursuant to 4 U.S.C. Section 111, that states are not at liberty to discriminate between federal retirees and state retirees. The inclusion of federal retirees was undertaken to preserve the exemption for state and local retirees."

Because of 4 U.S.C. Section 111, and this Honorable Court's ruling in the Davis case, the Kentucky Supreme Court has said that it is not obliged to address the pertinent Equal Protection concerns posed by the tax exemption of the Federal Pensioners sub-class. The unanswered challenge that the Federal Pensioners have no contractual privity, or other obligation due from the Commonwealth; or that no nexus, or other connection has been demonstrated between a state governmental purpose and a Federal Pensioners' tax exemption are not defended or even acknowledged by this Opinion. Neither has the Kentucky Supreme Court found it necessary to explain what there is about past employment services for a United States governmental agency that merits a gratuitous, retroactive and continuing tax exemption from Kentucky.

The only point which Kentucky's high tribunal is willing to concede, indicating that the passage of Senate Bill 4 was not quite rational, is contained in a footnote immediately following its curt, one-page dismissal of the Federal Pensioners from this case. The Court reluctantly acknowledges,

> "It is a fact difficult to ignore that Kentucky pays a high price for the exemption of state retirees from payment of income tax on their pension benefits. By virtue of the inclusion of federal retirees, the tax revenue lost far exceeds the tax

> saving to state retirees, those whom the exemption is intended to benefit." App., infra, 2a, note 1.

In point of fact, the "high price" of the "tax revenues" lost by exempting the Federal Pensioners sub-class is over two and one-half times the tax benefits received by Kentucky's own State and Local Pensioners.

Federal Pensioners	$17.0 million annually;
State & Local Pensioners	$6.2 million annually.

(See, supra, Page 6 above.)

The foregoing statement also plainly suggests that the "intergovernmental immunity doctrine" as employed in the Davis case, was intended to serve only a federal purpose of the United States. It has no state function and serves no state purpose. The Kentucky Supreme Court, however, has converted this federal doctrine into some, unstated and unidentified, state purpose which Kentucky seeks to treat as a license to practice the grossest kind of unjust tax discrimination upon its Non-Governmental Pensioners.

This statement of the case hereinbelow would also be incomplete without mention of a circumstance of alleged judicial indiscretion referred to in the Petition for Rehearing filed below. App., infra, 13a. When those unanswered issues of judicial ethics are married to the fact that fourteen members of the 1990 Kentucky General Assembly, including the sponsor of Senate Bill 4, were subsequently convicted of bribery and other criminal legislative misconduct, the need of these Petitioners for the Equal Protection afforded by the Fourteenth Amendment is self evident.

The Opinion of the Kentucky Supreme Court which this Honorable Court is respectfully asked to review was decided on January 31,1994. A Petition for Rehearing was denied herein on May 26,1994.

Among the several reasons why this Petition should be granted, the following seem the most pertinent.

REASONS FOR GRANTING THE PETITION

I. The Federal Intergovernmental Immunity Tax Statute, 4 U.S.C. Section 111, has been misapplied by the Kentucky Supreme Court to avoid adjudicating the Equal Protection rights of Kentucky's Non-Governmental Pensioners.

A major federal statute, 4 U.S.C. Section 111, has been invoked by the Kentucky Supreme Court as its sole and only reason for refusing to address the plain and simple Equal Protection questions posed by the Petitioners in this case, in respect of the tax discrimination being practiced against them. The Kentucky Supreme Court has thereby subordinated the Equal Protection clause of the Fourteenth Amendment, to an equally important federal constitutional doctrine, i.e. intergovernmental tax immunity for federal employees and pensioners. Whether it may lawfully do this is an important state-federal question involving basic constitutional rights created by the United States Constitution. Only this Honorable Court can answer this question.

In Allied Stores of Ohio, Inc. v. Bowers, 38 U.S. 522, 528 (1959), this Court observed:

> "The State must proceed upon a rational basis and may not resort to a classification that is palpably arbitrary. The rule often has been stated to be that the classification 'must rest upon some ground of difference having a fair and substantial relation to the object of the legislation.' F. S. Royster Guano Co. v. Commonwealth of Virginia, 253 U.S. 412, 415." (Emphasis Added)

The excuse for violating the Petitioner's, long established and well recognized, Equal Protection rights is said to be the federal intergovernmental immunity doctrine. Kentucky is therefore saying that it has no further duty to examine whether the Federal Pensioners sub-class exemption bears "a fair and substantial relation to the object of the legislation" (Id. 38 U.S.), which in this case is Kentucky's income tax statute, KRS 141.010, et. seq.

The Kentucky Supreme Court refuses in this case to recognize that there are two very distinct and different kinds of federal Constitutional rights at issue here. Underlying all, are the Equal Protection guarantees bestowed by the Fourteenth Amendment and enjoyed by all of Kentucky's pensioners, federal, state and non-governmental, alike. Superimposed and co-existing with these individual Equal Protection rights, is an additional and unrelated, constitutional right which belongs only to the Federal Government of the United States, to wit: That its employees and pensioners be free from State income tax discrimination, pursuant to and in accordance with the so-called "intergovernmental immunity doctrine." See Davis v. Michigan, dissenting opinion, supra, 489 U.S. at 819-822.

The interplay between the Equal Protection rights of Non-Governmental Pensioners and the rights of the United States to insist that its pensioners not be discriminated against, arose out of the Davis v. Michigan, supra, decision of this Court in 1989. The question presented here is a most important consequence of that ruling that only this Honorable Court can address. The Petition should be granted to settle this divisive issue which has been presented to this Honorable Court, seeking review, on at least two previous occasions; Missouri (1991) and Oklahoma (1993).

II. This Honorable Court should re-emphasize that Congress cannot by legislation direct that a State violate or deny the Equal Protection rights guaranteed by the Fourteenth Amendment.

A second important reason for granting this Petition is that Kentucky has apparently assumed that the Congress of the United States may, in the federal interest, direct Kentucky by way of a federal statute, 4 U.S.C. Section 111, to deny the Equal Protection of its tax laws to certain Kentucky citizens, namely the Non-Governmental Pensioner sub-class herein.

Petitioners, respectfully submit that this Honorable Court should nip such a dangerous constitutional aberration in the bud, lest Kentucky continue in its mistaken ways and other States fall into the same constitutional error by emulating Kentucky's attempt to amend the Federal Constitution by judicial fiat.

This Court has long recognized that Congress may not authorize or direct a State to do what Kentucky claims in this case. In Shapiro v. Thompson, 394 U.S. 1322, 1335 (1969), the rule in such cases was plainly stated, viz:

> "Congress may not authorize the States to violate the Equal Protection Clause. . . .Congress is without power to enlist state cooperation in a joint federal-state program by legislation which authorizes the States to violate the Equal Protection Clause. Katzenbach v. Morgan, 384 U.S. 641, 651, 86 S.Ct. 1717, 1723, 16 L.Ed.2d 828, n. 10 (1966)." (Emphasis Added)

This is not a new rule. In Reid v. Covert, 354 U.S. 1, 16 (1957), the Court stated:

> "There is nothing in this language [the supremacy clause] which intimates that treaties and laws enacted pursuant to them do not have to comply with the provisions of the Constitution. Nor is there anything in the debates which accompanied the drafting and ratification of the Constitution which even suggests such a result. . . ."

A Washington state court made clear why this rule applies also to the Kentucky Supreme Court's undertaking herein to just ignore the Petitioner's Equal Protection rights; to do so, would be tantamount to amending the federal Constitution. As the Court explained, in Washington State Com'l v. Tollefson, Wash., 571 P. 2d, 1373, 1377,

> "Whenever the federal law requires the State to act, the State must act in conformity with the Fourteenth Amendment. This rule must also apply to all courts; otherwise, the effect is to give to the judicial branch the power to amend the constitution. This cannot be done. Reid vs. Covert, supra," (Emphasis Added)

Petitioners respectfully suggest that this important principal of state-federal Constitutional construction should be reiterated by this Honorable Court for the edification of all the States. This Petition should be granted.

III. The classification of the Federal Pensioners into a separate sub-class for purposes of granting a Kentucky income tax exemption that was denied to other, Non-Federal, Pensioners was irrational and "palpably arbitrary," per Davis v. Michigan.

A third reason that this Petition should be granted is that this Court has already affirmatively ruled in Davis v. Michigan Dept. of Treasury, 489 U.S. 803 (1989) that there are "no significant differences" between federal pensioners and a State's own pensioners for purposes of a state income tax exemption scheme precisely like Kentucky's pension tax scheme. Id at 815.

The excuses offered by Michigan for its tax discrimination scheme were the same as those urged by Kentucky's Supreme Court to justify exempting Kentucky's state and local pensioners. While the Davis court acknowledged that such circumstances might serve as rational reasons for Michigan to exempt its own State pensioners, such "reasons" did not demonstrate any "significant differences" between the federal pensioners and Michigan's own pensioners. Id at 815. Davis v. Michigan is precisely on point with the case at bar, right down to the type of tax exemption involved and the excuses used to justify it.

The mere fact that the presence of federal pensioners invokes consideration of the intergovernmental immunity rights of the United States, does not alter the meaning of the Court's ruling in Davis concerning the "classification" issue. If the tax exemption does not rest on real "differences" between the pensioners, then it is "arbitrary" in every sense of the word.

The Petitioners respectfully submit that this Court cannot with judicial and intellectual consistency, distinguish between the pensioners in the case at bar, for purposes of an income tax scheme and the pensioners in the Davis case. The "classification" in both instances is per se, "arbitrary," since the classification

could not have been grounded upon a difference which did not exist. As the trial court ruled hereinbelow:

> "This taxation scheme takes a natural class, pensioners, and divides it for no substantial reason." App., infra, 25a.

That is precisely what this Honorable Court ruled in Davis. This Petition should be granted.

IV. No valid state purpose can be discerned by Kentucky's exemption of the Federal Pensioners sub-class, rendering the same irrational.

A fourth reason for granting this petition is akin to the "arbitrary" elements just discussed. In the somewhat related cases of Zobel v. Williams, 475 U.S. 55 (1982) and Hooper v. Bernalillo County Assessor, 472 U.S. 612 (1985), this Honorable Court could find no legitimate state purpose for discriminatory class legislation, and so, ruled the classification schemes in both cases to be irrational and therefore arbitrary. The Hooper majority expressed the Equal Protection rule in such cases, thusly,

> "When a state distributes benefits unequally, the distinctions it makes are subject to scrutiny under the Equal Protection Clause of the Fourteenth Amendment. Generally, a law will survive that scrutiny if the distinction rationally furthers a legitimate state purpose." (Emphasis Added)
> Id. at 818. See also McGinnis v. Royster, 410 U.S. 263, 270 (1973), wherein it was said that the inquiry must focus upon whether "the challenged distinction rationally furthers some articulated state purpose."

Considering these guidelines, what state purpose can be said to be served by exempting the Federal Pensioner sub-class from Kentucky's income tax statute?

a) KRS 141.010 et seq is a taxing statute which levies Kentucky's income tax. The undoubted State purpose for such a statute is primarily to raise state revenues for the operation of Kentucky's General Fund. Certainly, then the exemption of Kentucky's Federal Pensioners sub-class does not further the primary purpose of Kentucky's income taxing statutes.

b) The Kentucky Supreme Court suggests, however, that Kentucky's income tax statute may be useful in other ways to further a legitimate state purpose; for example, as a tax incentive device to "attract and retain" a stable work force. But how do the tax exemptions so freely granted to Kentucky's Federal Pensioner sub-class fit into this latter tax incentive purpose. The simple answer is that they do not!

Kentucky is not necessarily benefited by services rendered to the federal government, which it can neither direct or control. Clearly, Kentucky has no duty to assist federal agencies to secure a stable work force or to perform a strictly federal purpose. Certainly, it is a matter of indifference to the federal civilian and military agencies whether Kentucky offers a tax incentive to federal pensioners insofar as federal hiring practices are concerned, this is not a valid Kentucky purpose.

c) The unsupported idea of the Kentucky Supreme Court that the General Assembly's exemption of the federal pensioners was necessary to "preserve" the exemption for Kentucky's own pensioners is also a make-weight state purpose argument that will not wash. The Davis Court, supra, merely told Michigan that it should not discriminate against federal pensioners. It did not order or admonish Michigan to destroy or dismantle the exemption of its own state pensioners. In fact, the Court acknowledged that it probably had not the power to strike down the Michigan statutory provisions that created the State exemptions, saying that "such action could be construed as the direct imposition of a state tax, a remedy beyond the power of a federal court. . . ." Id. at 1509.

Thus, contrary to the assertion of Kentucky's Supreme Court, Kentucky's exemption of its own pensioners were by no means jeopardized or threatened by either 4 U.S.C. Section 111 or by this Court's rulings in the Davis case. As the legislative debates plainly prove, the Davis case excuse was principally urged by the federal employee lobbies and was repeated by them again and

again in the amicus briefs filed below by these same lobby groups. (See App. D, infra, 39a, et seq.)

d) Furthermore, no State purpose can be discerned upon the basis of any contractual privity, or other nexus of any kind, between these federal strangers and the Commonwealth of Kentucky. The not-so-subtle inferences in the Kentucky Opinion suggesting that the State may owe a bounty, which it denies to other pensioners, to retired employees from the federal service because of some imagined and ethereal beneficences showered upon Kentucky by those worthy publicans during their deprived working years, is ludicrous and irrational on its face.

No other legitimate or valid Kentucky purpose has been suggested. Therefore, under the rule of Zobel, Hooper and S. Royster Guano, supra, KRS 141.021 (Senate Bill 4) clearly denies the Equal Protection of Kentucky's tax exemption law to these Petitioners as no valid state purpose can be found to support it. This Petition should be granted.

V. Other attributes of Kentucky's pension tax scheme are not in accord with Equal Protection principles, indicating further reasons why this Petition should be granted.

Among the more prominent are the following:

A. The Federal Pensioner sub-class is not a "discrete" group of select pensioners within the meaning of Justice Stevens' dissent in the Davis case, supra.

The exempted Federal Pensioners herein constitute an open-ended and forever expanding sub-class of past, present and future federal, civilian and military employees who may presently be working or serving the United States federal government at any place in the world. They may number in the hundreds of thousands. No one really knows.

In terms of dollar value, the Federal Pensioner sub-class accounts for 72% of Kentucky's exempted pensioner benefits, and for almost 23% of Kentucky's total taxable pension values. ($17.3 million out of a total $76.27 million, per Chart, supra, Page 6).

This is hardly a "discrete" group within the context intended by the dissent in Davis, supra, 489 U.S. at 819-822.

B. The Federal Pensioner sub-class is being rewarded solely for "past contributions," to the Federal government a non-valid State purpose, per Zobel, supra, 457 U.S. 55 (1982).

In Zobel, the majority agreed that "a State's desire 'to reward citizens for past contributions' is clearly not a legitimate state purpose." Id. at 68. In the case at bar, the exemption is further defective since the contributions were not made in respect of a Kentucky purpose. There can be only two reasons for the tax exemptions afforded to the Federal Pensioner sub-class:

1. The exemption is an outright gift, which surely is not a valid state purpose.

2. The exemption must be for "past contributions" to the federal government, since no identifiable services were performed for Kentucky. It must not be forgotten here that these people are not eligible for a tax exemption until they retire and start drawing a pension, which is based entirely on "past" services rendered.

In Zobel, Chief Justice Rehnquist (457 U.S. at 81) dissented, pointing out that "past" hardships during early statehood was a rational and, therefore, valid circumstance upon which Alaska could base its discriminatory bounty favoring long-term residents. Petitioners, respectfully state that no such circumstance separates the federal pensioners from these Petitioners in this case. We are all just "pensioners" as far as a state tax on "pension income" is concerned.

In Hooper, supra, Justice Stevens dissented, (472 U.S. at 2869), finding a constitutional justification in the historic policy of providing special benefits for veterans' "past contributions" which has "always been deemed to be legitimate." Here, however, there is no historic justification for rewarding well paid and, non-onerous, federal employment on the part of Kentucky, by

supplying such people with a gratuitous, retroactive and continuous tax exemption.

C. The so-called "political check" sometimes relied upon to avoid undue federal interference in Equal Protection situations is ineffectual in Kentucky because of entrenched political forces and lobby groups.

The dissent in Davis v. Michigan, supra, refers to the "political check" which is theoretically at work in a democracy to protect the majority from the overreaching of favored minorities. The trial court's concerns about the baleful influence of lobbying activities upon the passage of a Senate Bill 4, which it described as, "great pressure from federal and state employee groups" suggests that the "political check," which may work in other states, is not operative in Kentucky. In matters of personal advantage to Kentucky's entrenched politicians, such as the pension tax exemptions herein that were enacted by a self-interested General Assembly and approved by a self-interested Kentucky Supreme Court, the notion of a "political check" is just a notion.

Justice Stevens, at another time and in differing circumstances, remarked,

> "In equal protection analysis, it is therefore appropriate to give some attention to the relative dimensions of favored and disfavored classes."
> Justice Stevens, dissenting in Attorney General of New York v. Soto-Lopez, 476 U.S. 898, 915 (1986)

Petitioners respectfully represent that if this Petition is granted, they will demonstrate, upon review, that the "favored classes" in this case also hold in their hands the "political check" spoken of in the Davis dissent.

D. The "travel rights" and "rights to migrate" of the Non-Governmental pensioners have been unconstitutionally impacted by Kentucky's pension tax scheme.

In the Soto-Lopez decision, supra, much is made of the interference, by a classification statute, with the travel rights, or rights to migrate, of the complainants. Such rights are also at issue in the case at bar, and as such rights are generally regarded as concomitant with Equal Protection inquiries, (See Justice O'Connor's concurring opinion in Zobel, supra, 457 U.S. 72), this Honorable Court should also be aware of such issues when considering this Petition.

The travel and migration implications of Senate Bill 4 were first broached to the General Assembly by the bill's sponsor, Senator Virgil Pearman, during debate on the measure. See App., 46a, et seq. If the right to travel and migrate are important considerations for these kinds of Equal Protection inquiries, then Petitioners affirm to this Court that such issues are contained in the trial record of this case.

VI. The Equal Protection issues presented in this Petition are important and require definitive answers which only this Honorable Court can provide.

The two most important Federal Constitutional issues raised in this Petition, which only this Honorable Court can answer, are:

1. Does the intergovernmental immunity doctrine outweigh the Equal Protection rights of these Petitioners, and others like them throughout the United States to be taxed or not taxed in a rational, non-arbitrary fashion?, and,

2. Does Kentucky have any valid state purpose in exempting its Federal Pensioners from taxation arising out of this Honorable Court's decision in Davis v. Michigan, supra, sufficient to deny the Equal Protection of its tax laws to its non-governmental pensioners?

Since before the American Revolution, ordinary people in this great and free country have insisted on equal taxation for equally situated persons. If exceptions are made to this standard, Americans have further insisted that such exceptions be based upon "reasonable" classifications enacted in keeping with fair and legitimate legislative purposes. Self serving and overreaching legislation, such as Kentucky's pension tax scheme, favoring those who make and judge such laws, have never been regarded by ordinary Americans, and enlightened jurists, to be either "reasonable" or "legitimate" in a free and just society.

These sentiments were, perhaps, best said over sixty-five years ago by Kentucky's most preeminent jurist, Justice Louis Brandeis, in his dissent in Quaker City Cab Co. v. Commonwealth of Pennsylvania, 277 U.S. 389, 404, 405 (1928):

> "In other words, the equality clause requires merely that the classification shall be reasonable. We call that action reasonable which an informed, intelligent, just-minded, civilized man could rationally favor. In passing upon legislation assailed under the equality clause we have declared that the classification must rest upon a difference which is real, as distinguished from one which is seeming, specious or fanciful, so that all actually situated similarly will be treated alike, that the object of the classification must be the accomplishment of a purpose or the promotion of a policy, which is within the permissible functions of the state. . . ."
> (Emphasis Added)

Justice Brandeis' definitions of the term "reasonable," pre-envisioned Justice Stevens' comments on the meaning of the term "rational" which he explains in his concurring opinion in City of Cleburne, Tex. v. Cleburne Living Center, 473 U.S. 432, 450-454 (1985) in this way:

> "The term 'rational' of course, includes a requirement that an impartial law maker could

> logically believe that the classification would serve a legitimate public purpose that transcends the harm to the members of the disadvantaged class. Thus, the word 'rational' - for me at least - includes elements of legitimacy and neutrality that must always characterize the performance of the sovereign's duty to govern impartially."
> (Emphasis Added)

This Honorable Court should apply these tests to the two basic Constitutional issues above stated; and this Petition should be granted for the reasons given herein, and because each of the United States is entitled to the guidance of this Court on a matter that affects all of the many hundreds of thousands of federal and non-federal pensioners residing in every state and territory of this nation.

CONCLUSION

The respective positions of the Parties on these issues may be summarized as follows:

a) Kentucky says it meets its Equal Protection burdens in this case because it has a rational reason to exempt federal pensioners, i.e., to satisfy the inter-governmental immunity duties imposed upon it by Congress and this Honorable Court.
b) Petitioners say that such a reason is not rational because it serves no Kentucky purpose. The purpose served by the questioned exemption is a Federal purpose, not a State purpose. The federal pension tax exemptions:

> 1) Do not produce tax revenues, but reduces tax revenues; 2) Do not further any tax incentive employment purposes for Kentucky; 3) Are not required to "preserve" Kentucky's state and local pension tax exemptions; 4) Are disproportionately expensive in relation to Kentucky's state and local exemptions; 5) Bestow no known benefits upon Kentucky; 6) Reward, in perpetuity, pensioners who have no privity or nexus to Kentucky to support such bounty; 7) Are palpably arbitrary per Davis v. Michigan, supra; and, 8) Improperly impinge upon the travel and migration rights of these pensioners and other pensioners moving into Kentucky.

For these reasons the federal exemptions are not reasonable or rational and are therefore arbitrary and a denial of Equal Protection to these Petitioners.

Only this Honorable Court can determine which of these conflicting Constitutional claims should be sustained.

Petitioners respectfully submit, however, that, inasmuch as Kentucky's Senate Bill 4 (KRS 141.021) has not cleared even the lowest hurdles for "reasonable" legislation as set by Justice Brandeis in his Quaker City Cab Co. dissent, supra, and does not even come close to being "rational" within Justice Stevens'

meaning in Cleburne Living Center, supra, the Petition herein sought should be granted.

Respectfully submitted,

John Marion Williams
Counsel of Record

James V. Marcum
1100 Ashland Tower
1212 Bath Avenue
Ashland, KY 41114
Counsel for Petitioners

Co-Counsel
For Petitioners:
Douglas C. Brandon
J. Brent Austin
Victorian Square
410 W. Main Street
Lexington, KY 40507

APPENDIX A

OPINION OF
SUPREME COURT OF KENTUCKY

93-SC-056-TG

COMMONWEALTH OF KENTUCKY
REVENUE CABINET — APPELLANT

ON TRANSFER FROM THE COURT OF APPEALS
V. NO. 93-CA-0176
FRANKLIN CIRCUIT COURT NO. 91-CI-1676
AND 90-CI-1302

JAMES RICHARD COPE and
ROY CARTER BRIEN, individually and
as representatives of a class, et al — APPELLEES

OPINION OF THE COURT

REVERSING

The decisive issue in this case is whether governmental pensioners and private industry pensioners may be separately classified under Section 59(15) of the Constitution of Kentucky for purposes of Kentucky income taxation of their pension benefits. The trial court was unable to discover a sufficient basis for the classification and held the exemption applicable to all pension benefit recipients. The Revenue Cabinet, appellant herein, appealed from the final judgment and this Court granted transfer. CR 74.02.

This action for declaratory and injunctive relief and restitution was brought by appellees, private pensioners who claim to have been subjected to collection of an unconstitutional income tax. They claim a violation of Sections 2, 3, and, in particular, Section 59(15) of the Constitution of Kentucky by virtue of the exemption of federal, state and local government retirees from payment of income taxes on their pension benefits. The trial court agreed with

appellees' contentions finding the exemption statute to be in violation of Section 59(15) of the Constitution of Kentucky. It said, "This taxation scheme takes a natural class, pensioners, and divides it for no substantial reason." The relief sought was granted.

Prior to reaching the classification issue, it is necessary to dispose of appellees' contention that the 1990 inclusion of federal retirees in the exempted class utterly invalidated appellant's argument with respect to a rational legislative basis for the exemption. Upon review of the legislative history of Senate Bill 4, codified as KRS 141.021, we are convinced that the sole and exclusive motivation for the inclusion of federal retirees was the decision of the Supreme Court of the United States in Davis v. Michigan, 489 U.S. 803, 109 S.Ct. 1500, 103 L.Ed.2d 891 (1989), which held, pursuant to 4 U.S.C. § 111, that states are not at liberty to discriminate between federal retirees and state retirees. The inclusion of federal retirees was undertaken to preserve the exemption for state and local retirees.[1]

The Constitution of Kentucky, Section 59(15) prohibits "local or special acts" which are "[t]o authorize or to regulate the levy, the assessment or the collection of taxes. . . ." From the Debates of the Constitutional Convention of 1890, it is clear that the overriding purpose of Section 59 and its twenty-nine subsections was to protect the citizens of Kentucky from special interest groups, foremost among them being the railroads and corporations which had previously obtained special privileges with respect to taxation and other matters. This purpose was recognized and explained in Tabler v. Wallace, Ky., 704 S.W.2d 179 (1985), cert. denied, 479 U.S. 822 (1986), wherein this Court invalidated a statute of repose which protected architects and engineers from civil liability. Significantly, Tabler acknowledged that nothing in Section 59 prevented the General Assembly from creating separate classifications providing there was a reasonable basis therefor. The Court stated that:

---

[1] It is a fact difficult to ignore that Kentucky pays a high price for the exemption of state retirees from payment of income tax on their pension benefits. By virtue of the inclusion of federal retirees, the tax revenue lost far exceeds the tax saving to state retirees, those whom the exemption is intended to benefit.

> There must be a substantial and justifiable reason apparent from legislative history, from the statute's title, preamble or subject matter, or from some other authoritative source. Tabler at 186.

A leading decision on the issue of classification is Schoo v. Rose, Ky., 270 S.W.2d 940 (1954), in which this Court invalidated a statute which exempted the owners of vehicles designed to carry more than nine persons from application of a statute which prohibited operation of motor vehicles upon the public highways unless the owner had paid the tax due on his property other than the motor vehicle. The Court established what has come to be known as the "Schoo test" for analyzing Section 59 challenges to legislation. The test established was whether the statute applied equally to all in a class, and whether there were distinctive and natural reasons inducing and supporting the classification. The Court prohibited division of a natural class into two parts and imposition of different rules upon the classes.

A recent decision on the issue here is Waggoner v. Waggoner, Ky., 846 S.W.2d 704 (1992), wherein we upheld a statute which exempted teachers' retirement benefits from division as marital property in an action for the dissolution of marriage. The Court forthrightly acknowledged that the statute "sets teachers up as a special class" but found the classification proper for a variety of reasons. Among the reasons identified were the non-inclusion of teachers in the Social Security system, the desirability of removing from society the responsibility of providing financial assistance to retired teachers, and the incentive it provided for teachers to enter and remain in the field of public education. The foregoing reasons were held sufficient under Schoo and Tabler and the action of the General Assembly was found to have a reasonable basis.

Finally in the discussion of our leading decisions, reference should be made to Delta Airlines, Inc. v. Commonwealth Revenue Cabinet, Ky., 689 S.W.2d 14 (1985), wherein the Court recognized the broad discretion of the General Assembly to classify taxpayers. We held that classification standards in Kentucky are the same as those under the Fourteenth Amendment to the Constitution of the United States and that economic factors may be validly considered by the Legislature in developing tax

classifications.[2] Broadly, the Court stated that legislative prerogative with respect to classification could be overcome only by "the most explicit demonstration that it is hostile and oppressive against particular persons and classes." Id. at 18. The Court relied, inter alia, on Reynolds Metal Co. v. Martin 269 Ky. 378, 107 S.W.2d 251 (1937), a venerable decision which upheld the validity of income taxation in Kentucky and broadly confirmed the power of the General Assembly to impose taxes on income.

While the decisions discussed herein do not exhaust those which are on point, they are representative and articulate the standards which we believe to be controlling of this case. Appellees urge and we agree that the applicable standards are well stated in Justice Wintersheimer's concurring opinion in Gillis v. Yount, Ky., 748 S.W.2d 357, 365 (1988), as follows:

> Constitutional limitations prohibit only such classification which is not [sic] arbitrary and unreasonable and has no fair and substantial relation to the permissible governmental purpose of the legislation. The classification for taxation is a policy matter for legislative determination. Ordinarily the judgment of the legislature is to be deferred to if there is any just and reasonable basis to support such a decision. The question then becomes whether it was arbitrary and unreasonable for the legislature to create a separate classification . . . .(Citation omitted.)

This Court is often without benefit of a substantial legislative history as we undertake to construe statutes or test their constitutionality. In this case, however, we are not so impaired.

---

[2] Delta Airlines, Inc. v. Commonwealth Revenue Cabinet, Ky., 689 S.W.2d 14 (1985), would appear to dispose of appellees' federal constitutional claim in view of our holding that the classification standards under the Kentucky Constitution are co-extensive to those under the Fourteenth Amendment to the United States Constitution. On the other hand, Tabler v. Wallace, Ky., 704 S.W.2d 179 (1985), suggests that the Kentucky standard is more rigorous than the federal constitutional standard. Thus, under either view, appellees' federal constitutional claim, if properly before the Court, is insubstantial.

The legislative history of Senate Bill 4 provides a remarkable insight into the factors which motivated the General Assembly in its enactment. It contains authoritative statements from the Chairman of the House Appropriations and Revenue Committee, the Senate sponsor of the legislation, and other members of the General Assembly deeply involved on both sides of the issue. Their views are entitled to considerable weight in our analysis of legislative history. Independent Community Bakers Association of South Dakota, Inc. v. Board of Governors of Federal Revenue System, 820 F.2d 428 (D.C. Cir. 1987), cert. denied, 484 U.S. 1004 (1988).

Following the 1989 decision of the Supreme Court of the United States in Davis v. Michigan, supra, the Kentucky General Assembly was faced with a dilemma. To achieve compliance, it was required to choose one of three alternatives: extend the tax exemption to federal employees; extend it to all retired public and private employees; or eliminate it with respect to state and local employees. Only by one of these methods could the requirement of equal treatment for federal retirees mandated by 4 U.S.C. § 111 be accomplished. Notwithstanding spirited opposition and the acknowledged loss of needed revenue, the General Assembly elected to maintain the exemption for state and local retirees by extending the exemption to federal retirees. Its motivations were that pension exemptions in favor of state and local governmental employees encouraged their continued service despite salaries which were legislatively found to be lower than those in private enterprise. It refused to grant such an exemption to private pensioners because of the revenue which would be lost. From legislative history, there is no doubt that the available options were hotly debated and fully considered and that the final enactment was the product of the legislative process. Neither is there any doubt that a primary motivation for continuation of the exemption was to attract and retain quality employees by granting them a tax advantage upon retirement. While the wisdom of such an approach is not indisputable, it is not arbitrary and bears a substantial relation to a permissible governmental purpose. Gillis v. Yount, Ky., 748 S.W.2d 357, 365 (1988), Wintersheimer, J., concurring. See also Waggoner v. Waggoner, Ky., 846 S.W.2d 704 (1992), which recognized the "attract and retain" doctrine as a reasonable basis for classifying retired teachers separately from

other retirees. As such, we conclude that the statute is not arbitrary and without a permissible legislative purpose.

Despite the foregoing, appellees urge this Court to apply a more rigorous test which could, in effect, require the existence of an objective, demonstrable distinction in circumstance before classification is permissible. They argue that the Supreme Court of the United States in Davis rejected the "attract and retain" doctrine and imposed a requirement of "significant differences between the two classes." They quote from Schoo that

> The classification must be based upon some reasonable and substantial difference in kind, situation or circumstance which bears a proper relation to the purpose of the statute. Schoo at 941.

Without holding that satisfaction of the foregoing standard is required to sustain the taxing statute at issue here, particularly in light of the presumption of validity we must accord acts of the General Assembly in matters such as this (Revenue Cabinet v. Estate of Marshall, Ky.App., 746 S.W.2d 408 (1988) and Reynolds Metal Co. v. Martin, 269 Ky. 378, 107 S.W.2d 251 (1937)), there is nevertheless a sufficient distinction between state and local employment on the one hand and private industry employment on the other hand to satisfy the more stringent test. Moreover, and inasmuch as pension benefits arise only by virtue of employment, the distinctions between public and private employment apply equally to public and private pensions. Retirees do not suddenly become fungible the day benefits commence. The nexus between employment and entitlement to pension benefits was confirmed in Davis v. Michigan, 489 U.S. 803, 808, 109 S.Ct. 1500, 103 L.Ed.2d 891 (1989).

There is an undeniable difference between governmental and private employment. Foremost among the differences is profit motive. Government does not exist for the purpose of making a profit, but for rendering services to citizens which they cannot or cannot so well themselves perform or obtain. In contrast, private enterprise has as its sole or overriding purpose the return of a profit to the owners whether they be the proprietors, partners or shareholders. For the purpose of discharging its duties,

government has been granted taxing power (Reynolds Metal Co. v. Martin, 269 Ky. 378, 107 S.W.2d 251 (1937)), a power not possessed by any private enterprise. As such, however, and by virtue of its fiduciary duty with respect to money collected from citizens through taxation, government is subjected to a great many restrictions not found in private enterprise. Among the restrictions upon government are the requirements that compensation of employees be set by legislative enactment rather than by a Board of Directors responding to market forces; and this restriction virtually eliminates the possibility of extra compensation or bonus pay for superior performance. There are no stock options.

It is an unrebutted legislative fact relied upon by the General Assembly that Kentucky state employees earn less than persons occupying comparable positions in private enterprise. The advancement of even the most able governmental employee may be limited by virtue of the existence of policy differences with the elected political leadership and those who occupy high-level policy positions are, in most cases, subject to lawful discharge upon the occurrence of differences with elected officials or a change in administration. Branti v. Finkel, 445 U.S. 507, 100 S.Ct. 1287, 63 L.Ed.2d 574 (1980), and Rutan v. Republican Party of Illinois, 497 U.S. 62, 110 S.Ct. 2729, 111 L.Ed.2d 52 (1990). Governmental employees are not generally permitted to organize and bargain collectively or engage in a strike (Board of Trustees, etc. v. Public Employment Council, Ky., 571 S.W.2d 616 (1978)); their right to engage in political activities is restricted (KRS 18A.140); and they are subject to civil and criminal sanctions not applicable to persons employed in private enterprise (KRS 522.010 and 42 U.S.C. § 1983).

In recognition of the foregoing somewhat negative features of governmental employment, the General Assembly has endeavored to provide certain benefits to governmental employees which may not be enjoyed by all persons working in the private sector. By virtue of the merit system, governmental employees beneath the policy level have greater job security than their counterparts in private enterprise. See KRS 18A and Shah v. American Syn. Rubber Corp., Ky., 655 S.W.2d 489 (1989). Likewise, they may satisfy minimum requirements for retirement eligibility with fewer years service than is required in private industry. While "fringe benefits" given to state employees may be lesser or greater than

those in private industry due to the wide disparity of benefits given, they are, nevertheless, generally regarded as being adequate. While the foregoing catalog of differences between governmental employees and employees in private industry is not comprehensive, it well illustrates the fundamental differences between them.

We recognize there may be subtle distinctions in the rules which appear to control the issue of classification. The rules set forth in Tabler v. Wallace, Ky., 704 S.W.2d 179 (1985), Schoo v. Rose, Ky., 270 S.W.2d 940 (1954), and Gillis v. Yount, Ky., 748 S.W.2d 357 (1988), appear to be more stringent than those found in Reynolds Metal Co. v. Martin, 269 Ky. 378, 107 S.W.2d 251 (1937), Markendorf v. Friedman, 280 Ky. 484, 133 S.W.2d 516 (1939), Revenue Cabinet v. Estate of Marshall, Ky.App., 746 S.W.2d 408 (1988), Alcohol Beverage Control Board, etc. v. Taylor Drug Stores, Ky., 635 S.W.2d 319 (1982), and Delta Airlines, Inc. v. Commonwealth Revenue Cabinet, Ky., 689 S.W.2d 14 (1985). In this case, however, whichever standard is applied is satisfied by the separate classification of state and local government retirees and private industry retirees. The General Assembly enacted the statute at issue here in furtherance of what it determined to be a proper public purpose and it is not the prerogative of the Court of Justice to legislate to the contrary. Moreover, as demonstrated herein, there are indeed real and substantial distinctions between public and private employment sufficient to justify the classification.

Appellees' contention that the statute violates Section 2 of the Constitution of Kentucky is without merit. Section 2 provides that "absolute and arbitrary power over the lives, liberty and property of free men exists nowhere in a republic, not even in the largest majority." This argument was answered in Revenue Cabinet v. Estate of Marshall, Ky.App., 746 S.W.2d 408 (1988), which recognized that classifications were not per se unreasonable. As we have determined that a reasonable basis exists for this classification, by definition, it may not be said to be arbitrary. Kentucky Milk Marketing and Anti-monopoly Commission v. Borden Company, Ky., 456 S.W.2d 831 (1970). Likewise, we find no violation of Section 3 of the Constitution of Kentucky. As the statutory classification was not improper, it represents no exemption from taxation within contemplation of Section 3. See

Commonwealth of Kentucky v. Kentucky Jockey Club, 238 Ky. 739, 38 S.W.2d 987, 994 (1931).

The classification issue here is not new. It was ripened by the inclusion of federal retirees in 1990. Prior to that time, however, and since the early 1940's, teachers and other state government employees had been exempt from income taxation of their retirement benefits and the exemption prevailed for fifty years without substantial challenge. The mere expansion of the class to include federal retirees did not thereby invalidate this accepted classification.

For the foregoing reasons, the final judgment of the Franklin Circuit Court is reversed and appellees' claims dismissed.

All concur.

ATTORNEYS FOR APPELLANTS:

Celia M. Dunlap
Division of Legal Services
Revenue Cabinet
P.O. Box 423
Frankfort, KY 40602

Donald L. Cox
Ilam E. Smith
Mary Janice Lintner
LYNCH, COX, GILMAN & MAHAN, P.S.C.
500 Meidinger Tower
Louisville, KY 40202

ATTORNEYS FOR APPELLEES:

Douglas C. Brandon
J. Brent Austin
Victorian Square
Suite 312
401 West Main Street
Lexington, KY 40507

James V. Marcum
1212 Bath Avenue
P. O. Box 2315
Ashland, KY 41105

ATTORNEY FOR AMICUS CURIAE, KENTUCKY RETIREMENT SYSTEMS:

William P. Hanes
David T. Miller
Kentucky Retirements Systems
Perimeter Park West
1260 Louisville Road
Frankfort, KY 40601

ATTORNEY FOR AMICUS CURIAE, TOM GOSSUM, THE KENTUCKY FEDERATION OF CHAPTERS OF THE NATIONAL ASSOCIATION OF RETIRED FEDERAL EMPLOYEES, CHAPTER 1610, AND THE COUNCIL OF KENTUCKY CHAPTERS OF THE RETIRED OFFICERS ASSOCIATION:

Thomas J. Luber
Virginia Hamilton Snell
Holliday Hopkins Thacker
WYATT, TARRANT & COMBS
Citizens Plaza
Louisville, KY 40202

Len W. Ogden, Jr.
The Sinnott House
228 North 9th Street
Paducah, KY 42001

APPENDIX B

EXCERPTS FROM THE PETITION FOR REHEARING BY PETITIONERS AND ORDER OF MAY 26, 1994 DENYING PETITION

II

THE JUDGMENT FILED IN THIS APPEAL DID NOT ADJUDICATE THE EQUAL PROTECTION AND DUE PROCESS RIGHTS GRANTED TO THESE APPELLEES BY THE FOURTEENTH AMENDMENT OF THE U.S. CONSTITUTION.

The Opinion of the Court in this appeal did not adjudicate the federal equal protection rights of the private pensioners. The rules which apply to the Appellees' federal equal protection claims in this case were best stated many years ago by Mr. Justice Brandeis in his dissent filed in the case of Quaker City Cab Co. V. Commonwealth of Pennsylvania, 277 U S. 389, 48 S.Ct. 553, 72 L.Ed. 927 (1928). This dissent, which was tacitly approved as a majority precedent by the 1973 decision in Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 93 S.Ct. 1001, 35 L.Ed.2d 351, stated the governing principles thusly:

> "The equality clause does not forbid a state to classify for purposes of taxation. Discrimination through classification is said to violate that clause only where it is such as to preclude the assumption that it was made 'in the exercise of legislative judgment and discretion.'
>
> In other words, the equality clause requires merely that the classification shall be reasonable. We call that action reasonable which an informed, intelligent, just-minded, civilized man could rationally favor. In passing upon legislation

> assailed under the equality clause we have declared that the classification must rest upon a difference which is real, as distinguished from one which is seeming, specious or fanciful, so that all actually situated similarly will be treated alike, that the object of the classification must be the accomplishment of a purpose or the promotion of a policy, which is within the permissible functions of the state and that the difference must bear a relation to the object of the legislation which is substantial, as distinguished from one which is speculative, remote, or negligible. Subject to this limitation of reasonableness, the equality clause has left unimpaired, both in range and inflexibility, the state's power to classify for purpose of taxation."
> (Emphasis Added) Id. 48 S.Ct. 556

The rule for equal protection purposes is that the classification must be reasonable, not arbitrary, and must bear some fair relation to the object of the statute creating such classification. In Johnson v. Robinson, 415 U.S. 61,94 S Ct. 1160, 39 L.Ed.2d 389 (1974) the Court said:

> Our analysis of the classification proceeds on the basis that although an individual's right to equal protection of laws does not deny. . .the power to treat different classes of persons in different ways . . . it denies the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike. . .
> (Emphasis Added) Id. 945 S.Ct. 1169.

Clearly it is arbitrary and unreasonable for the General Assembly to grant a tax exemption for federal pensions when such pensioners have no employment connection or other nexus to Kentucky whatsoever for state governmental purposes. There is no causal or natural relationship of any kind between a federal pension and a Kentucky income tax. In Gillis v. Yount, Ky., 748 S.W.2d 357 (1988) this Court said:

> Differences of a nature which permit classification for one governmental function are not transferable to permit classification for a different function. In this case the function is taxation. The classification serves no legitimate purpose to promote the governmental function directly involved. (taxation). (Emphasis Added)

Appellees submit that the tax exemptions granted retired employees of Kentucky's two largest employers, one of which, the federal government employees, never even worked for Kentucky, is not informed, intelligent, just, or civilized within the Brandeis rule, particularly in light of the disproportionate cost of the federal pensioners exemption and the obvious fact that Kentucky has no legitimate state interest in giving away state benefits to federal pensions. The uneven treatment and application of Section 59 in the present Opinion results in a violation of the Appellees' federal equal protection and due process rights, especially in respect of the federal pension exemptions which bear no reasonable relationship at all to the "object of the legislation" which is, as it was in Gillis, supra, the raising of tax revenues for the operation of state government.

III

THE JUSTICES SHOULD HAVE RECUSED THEMSELVES FROM RENDERING AN OPINION IN THIS MATTER BECAUSE OF INTEREST IN THE LITIGATION.

Each of the Justices rendering this opinion have an interest in the outcome to the extent that their sizeable judiciary pensions remains exempt from state taxation. This conflict was pointed out by a letter filed herein on March 4, 1993. In the event that the Plaintiffs were successful in this matter and were awarded tax refunds, it is well known that the budgetary problems of the Commonwealth might require cutbacks in many areas including salary increases for the judiciary. Appearances are important in this respect. At the time of oral argument of this appeal, on December 16, 1993, this Court was aware of circumstances and events which intensified and underscored the significance of the "self-interest conflict" question raised in the March 4, 1993 inquiry letter.

Those circumstances were:

(a) The substantial judicial pay increase legislation which would be considered by the up-coming 1994 General Assembly; and

(b) The recusal, or self-disqualification, on grounds on an indirect conflict of interest by Justices Spain and Lambert in a Section 59 appeal concerning the constitutionality of a "hospital provider tax."

Clearly, the judicial pay increase legislation will improve the judicial pensions of each Justice of this Court by many thousands of tax exempt dollars in years to come. This issue has been indelibly linked by the Appellant, Revenue Cabinet, to its principal argument herein, namely, that the Commonwealth cannot afford to treat all pensioners equally. As the Revenue Cabinet repeated at every opportunity:

> Essential Governmental Services (which would presumably include salary increases) will be significantly reduced . . . the tremendous impact . . . upon the citizens of the Commonwealth is obvious. . .to refund the money now the Commonwealth would be faced with prospects of

> raising taxes or reducing services . . . (Emphasis Added)

Appellant's Brief, P.44.

The commendable recusal by Justices Spain and Lambert in the Section 59 "Hospital Provider Tax" case, shows that the Justices are aware of the importance of avoiding even the mere appearance of impropriety as the Canons recommend. If merely sitting on a hospital board which might be affected by the "hospital provider tax" appeal, constitutes a reason for disqualification, by reason of a possible conflict of interest, as each Justice is reported to have said, then the same should be true in the present action where they sit in judgment on the constitutional legality of exempting public pensions, including judicial pensions, from taxation. Again, the problem is with the appearance of the issue.

Likewise, the prudent decision of Justice Leibson to recuse in the hospital tax case because his personal physician was a party suggests a similar action in this case where Chief Justice Stephen's personal attorney, Hon. Michael Maloney, is a prominent party in interest in the Appeal by virtue of his position as Chairman of the Senate Appropriation and Revenue Committee. See Canon 3, C(c). The Code of Judicial Conduct is intended to provide guidelines which, if followed, will assure that, "equal justice under law," is applied and will avoid the appearance of an uneven playing field. Accordingly, Canon 3 C(a) provides that:

> A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned. . . ." (Emphasis Added)

Movants herein do not mean to impugn the integrity of this Honorable Court and raise this issue only out of respect to the Court and duty to our clients. It seems entirely appropriate to suggest this course where the class benefitting from the statutory discrimination consists of all active and retired state employees, members of the General Assembly, members of this Court and the state judiciary, all county, city, urban-county and local employees,

from dog-catcher to county Judge Executive; all school teachers, active, retired and "waiting to be hired"; Rick Pitino, Denny Crum, and all college, university and community college personnel, the medical and dental staffs at the state professional schools, law professors and anyone else who works for Kentucky's largest employer.

CONCLUSION

Cope does not lightly pursue this appeal to this point, the final avenue of relief permitted by our rules. It brings this petition as a party wrongly denied its day in court on the claim of discriminatory legislation without a justifying distinctive difference. At this point, Cope is simply asking the Court to decide as a matter of law whether Section 59 of the Kentucky Constitution applies a heighten scrutiny of classifications over that accorded classifications by Sections 1, 2 and 3 of the Kentucky Constitution. That issue directly affects certain federal claims of equal protection and due process. Further, because of the situation the Justices are in with respect to their own pensions, the most prudent course would be for the recusal of each and every one of the Justices and the appointment of those without interest, to rule on the application of Kentucky and Federal law to this matter.

Respectfully submitted,

James V. Marcum
1212 Bath Avenue
P.O. Box 2315
Ashland, KY 41105

Douglas C. Brandon
J. Brent Austin
Victorian Square, Suite 312
401 W. Main Street
Lexington, Kentucky 40507

Counsel For Appellees

SUPREME COURT OF KENTUCKY

93-SC-56-TG

COMMONWEALTH OF KENTUCKY,
REVENUE DEPARTMENT MOVANTS

ON REVIEW FROM COURT OF APPEALS
V. 93-CA-0176
FRANKLIN CIRCUIT COURT NO. 90-CI-1302
AND 91-CI-1676

JAMES RICHARD COPE AND
ROY CARTER BRIEN, INDIVIDUALLY
AND AS REPRESENTATIVE OF A CLASS;
AND JAMES V. MARCUM, INDIVIDUALLY RESPONDENTS

ORDER

Respondents' petition for rehearing is hereby denied.

ENTERED May 26, 1994.

_____
Chief Justice

APPENDIX C-1

JUDGMENT OF FRANKLIN CIRCUIT COURT

COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION II

91-CI-01676
90-CI-01302

JAMES V. MARCUM and
JAMES RICHARD COPE, et al PLAINTIFFS

v. JUDGMENT

COMMONWEALTH OF KENTUCKY
REVENUE CABINET DEFENDANTS

This action is before the Court on defendants' motion for summary judgment. This action was instituted as a Declaration of Rights pursuant to KRS 418.040. Plaintiffs assert that the provisions of KRS 141.010 et seq. and KRS 141.021, as they exempt pension benefits received by citizens and residents of the Commonwealth of Kentucky from state and federal governmental sources from inclusion in "gross income" while including plaintiffs' private pensions, are unconstitutional. Plaintiffs receive pension benefits from private, non-governmental sources, and thus their pension benefits are taxed as "gross income" under KRS 141.010. Plaintiffs contend that KRS 141.021 violates the 14th Amendment equal protection clause of the United States Constitution, and also violates Sections 1, 2, 3, 26, and 59 of the Kentucky Constitution. Defendant asserts that the provision is constitutional, as the exemption for governmental retirement benefits has a rational basis and serves a legitimate end.

KRS 141.021 states, in pertinent part:

> Federal and local government annuities excluded from gross income.
>
> Notwithstanding the provisions of KRS 141.010, federal retirement annuities, and local government retirement annuities paid pursuant to KRS 67A.320, 67A.340, 67A.360 to 67A.390, 79.080, 90.400, 90.410, 95.290 to 95.620, 95.621 to 95.629, 95.767 to 95.784, 95.851 to 95.884, or 96.180, shall be excluded from gross income.

The provisions of the Kentucky Constitution at issue here, Sections 1, 2, 3, and 26, create protections similar to that of the Equal Protection Clause of the United States Constitution. Section 59, however, provides additional protections. Section 59(15) provides:

> The general assembly shall not pass local or special acts concerning any of the following purposes, namely:
> 15. To authorize or to regulate the levy, the assessment or the collection of taxes. . .

The resolution of the issue of constitutionality should begin, first, with an analysis of the Kentucky Constitution. If the statute is invalid under its provisions, there is no need to reach the federal constitution question. Plaintiffs assert that the statute must fall under Section 59(15), as the statute unconstitutionally chooses, without a rational basis, to tax one group, private pensioners, and exempt the other group, governmental pensioners.

For years, the Commonwealth of Kentucky exempted retired state employees' pensions from the definition of "gross income" under KRS 141.021. Following the U.S. Supreme Court decision in Davis v. Michigan, 489 U.S. 803 (1989), the statute was amended to exempt federal government pensions from the state income tax. In Davis, the Court held that the states may not, consistent with Intergovernmental Immunities Act, 4 U.S.C. Section 111, tax federal pensioners and not state pensioners. Id. at 817. As a result of that decision, the statute was amended in 1990

to include federal pensions, while subjecting private pensioners to tax on the income from their pensions.

The tax scheme creates two classes of retirees, those with private, taxable pensions, and those with governmental, nontaxable pensions. The legislature may create different classes, as long as there is not unreasonable discrimination between persons similarly situated. Plaintiffs argue that, while the "rational basis" test for equal protection is still applicable under the Kentucky Constitution, Section 59 imposes a greater burden upon the legislature to justify its classifications. They contend that the government must have a justification which did "in fact exist" and only upon that ground may it constitute a reasonable basis upon which to create the classification. Defendant argues that the protections of the Kentucky and the United States Constitutions are identical, and therefore, the state has broader latitude in determining a rational basis for its classification. The defendant asserts that, as long as there exists any state of facts possible which would justify such a classification, then the statute has a rational basis, and must be upheld.

The pivotal case interpreting Section 59 of the Kentucky Constitution is Tabler v. Wallace, Ky., 704 S.W.2d 179 (1985). In that case, the Kentucky Supreme Court evaluated the constitutionality of KRS 413.135 under the Kentucky and United States Constitutions. KRS 413.135 was the Kentucky "no action" statute, which gave immunity from suit to persons engaged in the design, planning, supervision, inspection, or construction of any improvement to real estate which causes damage or injury. Id. at 180. The Court held that the statute was unconstitutional under Section 59(5) of the Kentucky Constitution. Id. at 183. Since the Court resolved the question on state constitutional grounds, it was necessary to reach the question of the statute's validity under the federal constitution. Id. The Court held that Section 59 provides broader protection than the federal equal protection clause. Id. In so holding that Section 59 mandates closer scrutiny of legislative enactments, the court stated:

> When considered against its historical background, it is evident that Section 59 is more than simply another way of restating the generalized language of the equal protection

> clause of the United States Constitution. Indeed, Sections 1, 2, and 3 of the Kentucky Constitution which provide that the General Assembly is denied arbitrary power and shall treat all persons equally, suffice to embrace the equal protection clause of the Fourteenth Amendment. Id.

The Court included in its analysis all "twenty-nine different subjects" which are included in the prohibition against special legislation.

The Court went on to state that, in light of this special provision over and above that of the doctrine of equal protection, a greater scrutiny of the justification for the law is required, albeit within the confines of a traditional "rational basis" analysis. The test is thus:

> Whether the General Assembly had a reasonable basis for this legislation sufficient to justify creating a separate classification certain persons . . . .Id. at 185.

While this appears to be the same test as that employed under the Fourteenth Amendment, the Tabler court held that the justification for the law must be that which "did in fact exist." The court described this requirement, saying:

> The creative abilities of lawyers suggesting possible reasons after the fact does not suffice to provide the kind of justification that is required for special legislation to be valid under Section 59 of the Kentucky Constitution. Id.

The law cannot be held valid upon post hoc rationalizations; instead, there has to be "a substantial and justifiable reason apparent from legislative history, from the statute's title, preamble or subject matter, or from some other authoritative source." Id. at 186. This language, combined with the express purpose of Section 59, creates a higher standard for the constitutionality of an act than does the federal Constitution.

In Perkins v. Northeastern Log Homes, Ky., 808 S.W.2d 809 (1991), the Supreme Court again pointed out the unique nature of Section 59, as compared with the constitutions of other states. The Perkins court stated:

> Many have general protection against "arbitrary power" as we have in Kentucky Constitution Section 2, and guarantees of "equal" rights and protection against "grant" of "separate. . . privileges" as we have in Kentucky Constitution Section 3. But few have additional protection against local and special legislation as we have in Kentucky Constitution Section 59. So far as we can determine, none has anything like the combination of broad constitutional protection of individual rights against legislative interference vouch-safed by our 1891 Kentucky Constitution. Id. at 818.

Defendant argues that, while there is a higher standard for review under Section 59, great discretion is given to the General Assembly in taxation matters. Defendant cites the case of Schoo v. Rose, Ky., 270 S.W.2d 940 (1954), and its progeny, for the proposition that there is not the same degree of scrutiny in evaluating taxation schemes.

In Schoo v. Rose, the court evaluated the constitutionality of a statute which exempted carriers of persons operating vehicles carrying more than nine persons from a requirement that the license pay property taxes before he could receive a license. The court stated that, in tax cases under Section 59, the test for constitutionality is that "1. [i]t must apply equally to all in a class, and 2. there must be distinctive and natural reasons inducing and supporting the classification." Id. at 941. In describing these requirements for constitutionality, the court said that:

> [t]he Legislature cannot take what may be termed a natural class of persons, split that class in two and then arbitrarily designate the dissevered factions of the original unit as two classes and thereupon enact different rules for the government

> of each. It is equally well established that the classification must be reasonable and substantial difference in kind, situation, or circumstances which bears a proper relation to the purpose of the statute. Id. at 941.

In Schoo, the classification was struck and the law held unconstitutional because the difference offered by the state between the classes was not sufficient. Id. at 942. The court noted that the single difference between the two groups was that their license tax would be paid through different agencies, and thus there was no reasonable basis for a distinction between large carriers and other classes of vehicles. Id. The court did not engage in any speculation nor indulgence as to what the possible permissible motives of the legislature could have been; it looked at the classification and the fact that there was no real reason for that classification.

In Kling v. Geary, Ky., 667 S.W.2d 379 (1984), the court applied the Schoo test to a tax classification whereby motor vehicles were excluded from the tax rates used for real and other personal property. The court reasoned that excluding motor vehicles from such tax rates was a valid classification, as this was legislation which did not arbitrarily divide a class in half and treat both halves differently. Id. at 382. The court stated:

> When we apply the standards [of Schoo v. Rose] to motor vehicles and relate vehicles to the requirement of distinctive and natural reasons inducing and supporting the classification, it is apparent that vehicles do conform to the definition because of their mobility, rapid depreciation and frequency of transfer. Additionally, they stand virtually alone in licensing requirements. Thus, we uphold the classification of motor vehicles. Id.

The court went on to note that "[a]ll motor vehicles, under these statutes, are assessed in the identical manner and the taxes collected from the owner, when registered for use upon the highway," and that no vehicles were subject to a discount under the classification. Id. at 383-84.

From a consideration of both the Tabler line of cases and the Schoo line of cases, it is apparent that the classification exempting governmental pensions and taxing non-governmental pensions cannot stand. Neither Schoo nor Kling established that the courts must accept any rationalization that the state proffers for its classification scheme, even in the face of the state's broad taxation powers. Tabler and Schoo demand that there exist a basis for the classification which applies equally to all within the class and which is supported by distinctive, natural reasons for the classification. This taxation scheme takes a natural class, pensioners, and divides it for no substantial reason. Just as the Kling court assuredly would have struck down a tax upon foreign-made cars which was not also imposed upon domestic-made cars, in the absence of any indication from the legislative history, title, or subject matter of the act, so too must this court strike down this classification which divides a natural class and discriminates arbitrarily between the two halves. See Tabler at 186. Although Section 59 does not demand "exacting equality," it does demand that distinctions be made with a "reasonable basis in fact." Graham v. Millis, Ky., 694 S.W.2d 698, 701 (1985). The post hoc rationalizations offered by defendants' counsel do not meet the constitutional standards to be applied in evaluating the constitutionality of a law under Section 59. Tabler v. Wallace, Ky., 704 S.W.2d 179, 186 (1986). Streight v. Ragland, Ark., 655 S.W.2d 459 (1983) and Schnorbus v. Director of Revenue, Mo., 790 S.W.2d 241 (1990), cert. den. 111 S.Ct. 679 (1991), while dealing with the same subjet matter, simply do not address the greater protection which the Kentucky Constitution provides against special legislation. The defendants' argument that to hold this law unconstitutional would abrogate the General Assembly's power to tax begs the question. Clearly, the "broad discretion to legitimately classify various taxpayers has long been recognized." Delta Air Lines v. Commonwealth of Kentucky Revenue Cabinet, Ky., 689 S.W.2d 14, 18 (1985). However, the key is the "legitimate classification" of such taxpayers under Tabler, and where the government evinces no substantial basis for a classification, then it should be struck down.

Therefore, this court holds that KRS 141.010 et seq. is unconstitutional to the extent that it authorizes the assessment and collection of the Kentucky individual income tax upon the

retirement annuity or pension benefits, paid to the plaintiffs, as it violates Section 59(15) of the Kentucky Constitution.

This is a final and appealable judgment and there is no just cause for delay.

SO ORDERED THIS 20th day of MARCH, 1992.

_____

JUDGE, FRANKLIN CIRCUIT COURT

APPENDIX C-2
ORDER OF FRANKLIN CIRCUIT COURT

COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION II

CIVIL ACTION NO. 91-CI-01676
CIVIL ACTION NO. 90-CI-01302

JAMES V. MARCUM AND
JAMES RICHARD COPE, et al PLAINTIFFS

v. ORDER

REVENUE CABINET
COMMONWEALTH OF KENTUCKY DEFENDANT

This action is before the Court to determine the remedy for the unconstitutional taxation of the retirement annuity and pension benefits of private pensioners. This court, on March 20, 1992, declared that KRS 141.010, et. seq. and KRS 141.021 were unconstitutional under Section 59(15) of the Kentucky Constitution, to the extent that these provisions exempted pensions and retirement annuities received from state and federal sources while including the pensions and annuities of private pensioners in "gross income." Plaintiffs contend that they are entitled to retrospective and prospective relief from the unconstitutional tax provisions. They argue that, unless the retrospective relief of a refund for the tax years 1990 through 1992 is given, they will effectively be denied a remedy. The defendant argues that the only proper remedy would be to strike the offending provision, KRS 141.021, in its entirety, thus subjecting all classes of pensioners to the tax on an equal basis. Defendant also argues that the instant case has established a new principle of law, and therefore, the decision should not be applied retroactively, under Chevron Oil v. Huson, 404 U.S. 97 (1971).

First, this court must determine whether a new principle of law has been established which would limit the plaintiffs to

prospective relief under Chevron Oil, or whether retrospective relief must be given, consistent with the due process clause of the Fourteenth Amendment to the United States Constitution, as held in McKesson v. Division of Alcoholic Beverages, 495 U.S. 17 (1990). Under Chevron Oil, there would be no right to a refund of taxes already paid if the court has established a new principle of law clearly overruling past precedent on which litigants may have relied, or if the court has decided an issue of first impression the resolution of which was not clearly foreshadowed. Chevron Oil, at 306; American Trucking Associations v. Smith, 496 U.S. 167 1990. In determining whether refunds are appropriate, we must look to the test set out in Chevron Oil. Yount v. Calvert, 826 S.W.2d 833 (1991). This test provides:

> First, the decision to be applied non-retroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied. . .or by deciding an issue of first impression whose resolution was not clearly foreshadowed. . .
>
> Second, it has been stressed that "we must. . .weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation. . .
>
> Finally, we have weighed the inequity imposed by retroactive application, for "[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding on non-retroactivity.
> Chevron Oil, at 306 (citations omitted); Yount v. Calvert, 826 S.W.2d at 836.

The Chevron Oil test is the exception rather than the rule. In an ordinary case, no question of retroactivity arises. James B. Beam Distilling v. Georgia, 501 U.S.-,-,115 L.Ed.2d 481, 487 (1991). The doctrine of stare decisis will ordinarily work to

protect the reliance interests of litigants. In this case, defendant argues that there has been a "new principle of law" declared which has departed from precedent and, thus, is subject to the Chevron Oil non-retroactivity rule. Defendant contends that this case has established a new rule of law which was not anticipated by the parties and not clearly foreshadowed. We disagree. The cases cited by defendant, for the most part, do not deal with Section 59 of the Kentucky Constitution, and where they do, the cases consider situations in which the legislative classification was upheld on the basis of valid and real considerations. In the case at bar, the enactment was supported only by arbitrary and invented considerations, created after the fact of the enactment.

Tabler v. Wallace, Ky., 704 S.W.2d 179 (1985) is the cornerstone of our ruling in this case. Defendants argue that "a social or economic basis presented to justify a class may be a reasonable basis for a classification." This is entirely true. However, the question remains whether or not the reasons or justifications did exist in fact with respect to the particular classification at hand. The Supreme Court in Tabler was fundamentally concerned, as we are in this case, with the question of whether or not the legislation was "enacted in response to a lobbying effort rather than because of reasonable, natural, and justifiable distinctions between the protected group and others." Id. at 185. The court stressed that the purpose of Section 59 is "to prevent those who have sufficient political power or who can afford a persuasive lobbyist from achieving immunity from accountability from the law that governs others." Id. at 186. The language of the court's opinion and the history of Section 59's enactment reveal that Section 59 is designed to offset the special treatment of persons who can most effectively lobby the General Assembly. Our holding in this case reflects that fundamental idea reflected in Tabler and its predecessor cases, and thus does not announce a new principle of law.

Defendant's other argument under the first prong of Chevron Oil, that the resolution of this case was not clearly foreshadowed, is refuted by the legislative history of Senate Bill 4. It is evident that the legislature expected constitutional problems with Senate Bill 4, and it is equally evident that they responded to great pressure from federal and state employee groups in passing the measure. In the transcripts of the legislative debates over the bill,

there is scant evidence of any "social or economic consideration" which would have enabled the bill to pass constitutional muster. In fact, the record is replete with statements regarding the economic hardships that the Commonwealth would endure as a result of the passage of the bill. Chairman Clarke of the House Appropriations and Revenue Committee, recognizing the lack of a real economic or social basis for the measure, stated:

> We're probably going to get sued by private retirees anyway. That costs about $100 million.
> Transcript II, p.7.

In the Senate floor debate on the bill on February 9,1990, Senator Schmidt stated in opposition to the bill:

> What is the difference between a secretary who works at a CPA's firm and a secretary who works in the Revenue Department or the IRS? Or what's the difference between a worker who is on a construction truck building our highways and someone who drives a truck for the Highway Department? Why should they be treated differently? It really just doesn't make sense, and I think that we should treat everybody fair and equitable.
> Transcript I, p.4.

Later, he stated that "to perpetuate or to increase that discrimination [against private retirees] would really be a gross injustice." Senator Williams stated that:

> I'd submit to you, Members of the Body, that the reason that they're not going to be treated the same
> . . .is because they don't have the same political influence, those other pensioners out there don't, the political retirees and state employees and public officials have presently. I think that the thing throughout this entire session, up to this point, is that let's treat those with political

> influence differently.. .That's why we're afraid of them. That's why we don't want to treat the common working man and woman of this state like everyone else.
> Transcript I, p.7-8.

There is ample evidence, given the legislative history of the bill and the dictates of Section 59, that the litigants foreshadowed that the law would be declared unconstitutional.

Under the second prong of Chevron Oil, we must consider the "prior history of the rule in question, its purpose and effect, and whether retrospective application will further or retard its operation." Chevron Oil, at 306. The stated purpose of Section 59 is to prevent the creation of arbitrary classifications grounded in special privileges. Retrospective relief will help ensure that the state carefully considers the constitutionality of its taxation legislation before it embarks upon its enactment. Section 59 seeks to deter the legislature from countenancing favoritism and doling out public goodwill for the benefit of a few. Applying the decision non-retroactively would retard the impact of Section 59 and, essentially, leave it an empty shell.

The third prong of Chevron Oil states that we must weigh the inequities imposed by retroactive application. KRS 134.590(1) states:

> when it appears. . .that money has been paid into the State Treasury. . .under a statute held unconstitutional. . .the agency shall refund the money. . .

The Commonwealth has consented to a refund by statute, thus, the equities of the situation lie with the plaintiffs. The legislative transcripts evidence, as discussed above, the legislature's cognizance of the problems with the act. Yet, the legislature chose to enact the provision in clear contra-version of Section 59. Despite whatever financial burden may result from retrospective relief, the inequity of unconstitutionally exempting federal and state pensioners remains this Court's primary concern. As such, the equities balance out in favor of the plaintiffs.

In accordance with McKesson v. Division of Alcohol Beverage and Tobacco, 110 L.Ed.2d 17 (1990), the state must provide a "clear and certain remedy" against unlawful exactions of a tax in order to satisfy the commands of the Due Process Clause. This remedy appears in KRS 134.590, as stated above. As this Court has determined that the requirements for non-retroactivity were not met under Chevron Oil, due process requires that the plaintiffs be given meaningful retrospective relief.

Therefore, it is hereby ordered that the private pensioners, and each of them, shall have the right to file with the defendant Revenue Cabinet, their claims or claims for creditor refund of all taxes paid by any such private pensioner upon the retirement annuity or pension benefit income of such private pensioner, pursuant to KRS 141.010 et. seq., for the calendar years 1990, 1991, and 1992, and for as long thereafter as the unconstitutional exemptions continue to exist or continue to be honored by defendant, Revenue Cabinet. These claims, herein called the "private pensioner tax refund claims", shall be filed on or before the expiration of two calendar years following the termination of this litigation with defendant, in the manner and form prescribed by law for the filing of tax refund claims. It is further hereby ordered that defendant shall promptly ascertain the accuracy of each such private pension tax refund claim received by it, and shall thereupon compute a "private pensioner tax refund" in respect of each claim in the following manner:

(a) the gross amount of each accurate refund claim shall be increased by the tax rate interest proscribed by statute to determine an adjusted tax refund;
(b) each adjusted tax refund shall be decreased by the award of costs and attorney fees as hereinafter provided;
(c) the remaining net amount shall be certified as a "private pensioner tax refund" for each such claim, to the private pensioner, and shall be paid in the manner and form provided by law for the payment of tax refund claims by defendant, Revenue Cabinet.

It is further declared that the award of costs and attorneys' fees ordered to be deducted from any private pensioner tax refund claim, as aforesaid, and the payment and disposition thereof, shall

be determined by this Court pursuant to the provisions of KRS 412.070 upon a hearing to be noticed pursuant to an appropriate motion by the plaintiffs, following the final adjudication of this action. This Court shall retain jurisdiction of the subject matter of this action for the purposes of adjudicating any question, dispute, interpretation or other matter properly certified and noticed for hearing by any party thereto.

This is a final and appealable order and there is no just cause for delay.

SO ORDERED THIS 7th day of OCTOBER, 1992.

_____

JUDGE, FRANKLIN CIRCUIT COURT

APPENDIX C-3
ORDER OF FRANKLIN CIRCUIT COURT

COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION II

CIVIL ACTION NOS. 91-CI-01676
and 90-CI-01302

JAMES V. MARCUM
and
JAMES RICHARD COPE, et al — PLAINTIFFS

v. — ORDER

REVENUE CABINET
COMMONWEALTH OF KENTUCKY — DEFENDANT

Defendant has moved the court to alter, amend or vacate its judgment of October 7, 1992. Defendant argues that the order of October 7, 1992, is unclear in what actions it commands the Revenue Cabinet to take. For purposes of clarity the phrase beginning in Line 2 of Page 8 of that order and consisting of the words "and for so long thereafter as the unconstitutional exemptions continue to exist or continue to be honored by the defendant, Revenue Cabinet" are ORDERED STRICKEN and the following phrase inserted as substitution: "and for so long thereafter as the Revenue Cabinet continues to include in the taxable gross income of the private pensioners their respective retirement annuities and pension benefit incomes, while simultaneously excluding from taxable gross income the retirement annuities and pension benefit incomes of the state, local and federal pensioners."

In all other respects the motion of the defendant to alter, amend or vacate is DENIED.

This is a final and appealable order and there is no just cause for delay.

SO ORDERED THIS 23 day of DECEMBER, 1992.

_____

JUDGE, FRANKLIN CIRCUIT COURT

APPENDIX D

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS OF KENTUCKY GENERAL ASSEMBLY RELATING TO LEGISLATIVE DEBATE ON SENATE BILL 4, 1990 REGULAR SESSION

TRANSCRIPT I

Transcript of Proceedings had taken from videotape proceedings relating to Floor Debate on Senate Bill 4.

KENTUCKY SENATE
FRIDAY, FEBRUARY 9, 1990

JOE EWALT: There was more controversy, though, over Senate Bill 4, which would let retired federal employees avoid paying Kentucky income taxes on their pension benefits.

Supporters argued that the State is loosing over $20 million a year, because federal retirees move to states like Florida, which already allow such a tax break.

It's been estimated that Kentucky would lose $16 to $19 million a year by exempting federal pension benefits from state taxes.

After taking up the bill, the senate quickly agreed to add a half million dollars a year more to that impact by including local government retirees.

The major debate centered on an amendment offered by Senator Art Schmidt. He proposed adding all private sector retirees to the state tax exemption.

We'll pick up their video coverage with Senator Schmidt's outline of his amendment.

SENATOR SCHMIDT: Mr. President, I call for Floor Amendment 1.

MR. PRESIDENT: Amendment printed copy of Senate Bill No. 4.

Senator Schmidt.

SENATOR SCHMIDT: Mr. President, Members of the Senate, this Floor Amendment No. 1 is -- goes along with the fairness and equity issue. And what it would do would exclude private pensions from the state income tax, the same as government pensions would be excluded.

I'd like to read or quote exactly the comments that were made at the A & R Committee Members by the representatives from the Revenue Department, and this was representating the Administration's point of view. In quote, "In the interest of fairness and equity of our retirees consistent with the goals of the Administration in making Kentucky the most attractive state in the nation in which to retire, and in recognition of long-range economic benefits of having our retirees remain in the state, the Administration is prepared to support Senator Pearman's bill, Senate Bill 4." That was Senate Bill 4.

With this amendment, I guess the Administration ought to be about ten times happier with it than it is now, because that's about what it would effect. If you -- you can go across this state, starting in western Kentucky, I guess, with General Tire up to Ashland Oil, to the steel plants, General Motors, Ford, General Electric, IBM. I'm sure most of you know some people from one of these companies and many more who have retired. And it just really wouldn't be fair to tax those people -- to require them to pay a tax on their retirement -- on their pension and then exclude someone else. And so it is fairness and equity.

And I also would like to ask, what is the difference between a secretary who works at a CPA's firm and a secretary who works in the Revenue Department or the IRS? Or what's the difference between a worker who is on a construction truck building our highways and someone who drives a truck for the Highway Department? Why should they be treated differently?

It really just doesn't make sense, and I think that we should treat everybody fair and equitable. And that's why I'd move for passage of Senate -- or Floor Amendment 1 and ask for a roll call vote.

MR. PRESIDENT: Motion has been made and seconded on the passage of Floor Amendment 1 for Senate Bill 4. Is there a discussion? Senator from Hardin.

SENATOR PEARMAN: Mr. President, Members of the Senate, this is a hard amendment to be against. I understand where the gentleman from Campbell is coming from. But it's taken about 17 years to get where we're at on Senate Bill 4.

I would suggest to the Senator from Campbell that maybe we start a new bill and find a way to offset the revenue. Yes, it would be good for Kentucky. And I think sooner or later down the road, we're going to be dealing with that.

I'd like to exempt all those employees here today, but I believe the physical impact on this, if I'm looking at it right, is somewhere around $90 to $100 million a year. And I don't know how we could do that in this session.

I would be willing -- and I've talked for a long time. I think that if Kentucky would do it and do away with all its state income tax on retired pay, it would be one of the best things we could do for industry in Kentucky.

But right now, with that almost $100 million impact, I think what it does is just kill the bill we've got this far. And, I think, mainly the reason why we have the Senate Bill 4 here today is because mainly the federal court ruling and the state supreme court.

So I would ask you to beat the amendment and we'd look at it later and see what we can do to keep those unemployed in the state of Kentucky.

MR. PRESIDENT: Senator from Campbell.

SENATOR SCHMIDT: Mr. President, I would like to respond to the gentleman -- or the senator. Again, repeating what our Revenue Department, who are the experts in this area, and the Governor's position, is that by doing this, the long-range economic benefits of having our retirees remain in the state are great and we should be doing that. Let's try to keep them here. And I can see all these people getting in their cars and driving back from Florida, if we would do this, to allow them to have that opportunity to live here. As far as waiting another 17 years, I think that would grossly unfair to all of the people that we represent.

We represent, I'm sure, if you think about it, in probably every district, with the exception of very few, there are many,

many more retirees from private companies than there are government retirees. And I think that to perpetuate or to increase that discrimination would really be a gross injustice. And that's why I would hope that you would change your mind, Senator, and vote with my amendment.

MR. PRESIDENT: Further discussion?

Senator from Barren.

SENATOR BARKER: I'd like to speak against the amendment, Mr. President. This will further contribute to the erosion of our tax base, which has occurred all too frequently during the 1970s and 1980s, and led us to the financial plight that we find ourselves in this session, when everybody understands we're going to be called upon to raise substantial new sums of revenue.

This amendment, if passed, is the equivalent almost of one cent of our sales tax, present revenue being taken away. And that's a lot of money when we face the educational reform package that's going to be coming in another week or two and all the other needs the state government has. So I would ask the Senate to vote "no".

MR. PRESIDENT: Senator from Hardin.

SENATOR PEARMAN: I'll pass.

MR. PRESIDENT: Senator from Cumberland.

SENATOR WILLIAMS: Mr. President, Members of the Body, I'd like to answer the question that was proposed by the Senator of Campbell -- from Campbell, and that is why aren't other retirees and pensioners going to be treated like the folks that are mentioned in the Senator from Hardin's bill. And I'd submit to you, Members of the Body, that the reason that they're not going to be treated the same, if we vote against this, is because they don't have the same political influence, those other pensioners out there don't, the political retirees and state employees and public officials have presently.

I think that the thing throughout this entire session, up to this point, is that let's treat those with political influence differently. Let's treat state employees -- Senator from Cumberland, they said, "Don't stand up and say anything about this sick day thing, the state employees will be after you. Now, don't say anything about this bill, the state retirees will be after you."

Well, I submit to you that the Senator from Campbell is talking about equity and right is right and wrong is wrong. And we have the audacity to hear people talk about political nepotism and political influence and then come on this floor and exempt people, 90 percent of whom were hired, and you know it, because of political influence. How many state employees get jobs in this state, if their from unpopular factions of the majority party? How many state -- how many people get these jobs? That's why we're afraid of them. That's why we don't want to treat the common working man and woman of this state like we do everyone else.

So, if you vote "no" on this amendment, you'll send a clear message out there to all the folks, that you don't have enough political influence to warrant equal treatment. So you ought to get involved in the system on the down side. That if you've worked and if you have contributed to a pension plan, you're going to be treated differently, because you're not a group of the in-crowd. And that's who we're up here to take care of, the in-crowd.

So I submit that if the bill passes without this amendment, it's another example of gross inequity.

MR. PRESIDENT: Senator from Hardin.

SENATOR PEARMAN: Mr. President, Members of the Senate, just a brief comment. Like I said, I'm not -- I'm not against their amendment, if it come in a different form. But I know what it's going to do to my bill. It's going to put such a physical impact on it, there's no way to pass it. And this has come about after a long, hard work.

The Senator from Laurel there, he's the minority party. He's kept us on this bill. He says it's Christian. And we've got -- you know, we've got a lot of hard work. But what's going to happen here, if we do this today, we're going to kill the bill. Now, that's what's going to happen.

TRANSCRIPT II

Transcript of Proceedings had taken from audio tape proceedings relating to Senate Bill 4 and House Bill 5 of:

HOUSE APPROPRIATIONS
AND
REVENUE COMMITTEE

WEDNESDAY, MARCH 14, 1990

HOUSE A & R

CHAIRMAN CLARKE: There is a quorum present. The minutes of the March 9th meeting, which I didn't attend, are in your folders. Any objection? Without objection, then, the minutes of the March 9th meeting are approved.

The first Bill on the agenda is Senate Bill No. 4, which was heard in terms of public comment last week. Also, I should have posted House Bill 5, Representative Richardson's Bill, which does the same thing. So I would like to have Senator Pearman and Representative Richardson both appear.

Since I wasn't here last week, I don't know what all you all accomplished while I was gone.

SENATOR PEARMAN: I think we got it passed.

CHAIRMAN CLARKE: You think you got it passed. Okay.

SENATOR PEARMAN: Thank you, Mr. Chairman and Members of the Committee. Yes, we do have a Senate Bill 4 and House Bill 5. Representative Paul Richardson from over in Clark County is the prime sponsor down in the House and we started both of these Bill out of the interim on military affairs.

I'm not going to get into a long speech. You've heard this before. But I would hope that we -- when we act on Senate Bill 4 and House Bill 5, whatever you want to act on, is that we take consideration of the two court decisions that we have to treat the federal employees same as state. And I don't want us to get into a situation of where we're going to penalize the state employees and

start this move out of the state of Kentucky. And I just hope the Members of the Committee can see fit to pass Senate Bill 4 out or House Bill 5 in its original language. And I'm not going to say a whole lot.

Paul, what do you have to say?

REPRESENTATIVE RICHARDSON: Very little, Virgil, just other than add just what you said.

CHAIRMAN CLARKE: Well, after quite a lot of study and evaluation, I have a committee substitute, which I think everyone's aware of. I'd like for Gilmore to explain the committee substitute first, and then I want to make some remarks myself.

MR. DUTTON: Mr. Chairman, the committee substitute imposes an income test before any federal or state or local retirement annuities are exempt from the state's income tax.

If the strategy, the technical strategy, within the Bill is to exempt all federal, state, and local retirement annuities from the income tax and then add them back in, to the extent that the combined taxable income to Kentucky and the retirement annuities exceed $25,000.

(NON-PERTINENT DEBATE OMITTED)

CHAIRMAN CLARKE: Any further questions? Are you going to ask a question?

Let me say that, this is an issue that we've agonized about. I totally disagree with what Congress did and with the Supreme Court's agreement that Congress could do what they did.

In other words, Congress passed an act that says if you're going to exempt your state and local employees from tax on pension benefits, you have to treat federal retirees the same way. I consider that, personally, a gross invasion of state's rights.

The reason that we exempted state and our teachers and our state employees from taxation is that that was a benefit that they got for having worked on a relatively low scale for many years. And so I thought that was -- I'd rather you didn't keep demonstrating, even if it's when I'm talking.

TRANSCRIPT II

Transcript of Proceedings had taken from audio tape proceedings relating to Senate Bill 4 and House Bill 5 of:

HOUSE APPROPRIATIONS
AND
REVENUE COMMITTEE

WEDNESDAY, MARCH 14, 1990

HOUSE A & R

CHAIRMAN CLARKE: There is a quorum present. The minutes of the March 9th meeting, which I didn't attend, are in your folders. Any objection? Without objection, then, the minutes of the March 9th meeting are approved.

The first Bill on the agenda is Senate Bill No. 4, which was heard in terms of public comment last week. Also, I should have posted House Bill 5, Representative Richardson's Bill, which does the same thing. So I would like to have Senator Pearman and Representative Richardson both appear.

Since I wasn't here last week, I don't know what all you all accomplished while I was gone.

SENATOR PEARMAN: I think we got it passed.

CHAIRMAN CLARKE: You think you got it passed. Okay.

SENATOR PEARMAN: Thank you, Mr. Chairman and Members of the Committee. Yes, we do have a Senate Bill 4 and House Bill 5. Representative Paul Richardson from over in Clark County is the prime sponsor down in the House and we started both of these Bill out of the interim on military affairs.

I'm not going to get into a long speech. You've heard this before. But I would hope that we -- when we act on Senate Bill 4 and House Bill 5, whatever you want to act on, is that we take consideration of the two court decisions that we have to treat the federal employees same as state. And I don't want us to get into a situation of where we're going to penalize the state employees and

start this move out of the state of Kentucky. And I just hope the Members of the Committee can see fit to pass Senate Bill 4 out or House Bill 5 in its original language. And I'm not going to say a whole lot.

Paul, what do you have to say?

REPRESENTATIVE RICHARDSON: Very little, Virgil, just other than add just what you said.

CHAIRMAN CLARKE: Well, after quite a lot of study and evaluation, I have a committee substitute, which I think everyone's aware of. I'd like for Gilmore to explain the committee substitute first, and then I want to make some remarks myself.

MR. DUTTON: Mr. Chairman, the committee substitute imposes an income test before any federal or state or local retirement annuities are exempt from the state's income tax.

If the strategy, the technical strategy, within the Bill is to exempt all federal, state, and local retirement annuities from the income tax and then add them back in, to the extent that the combined taxable income to Kentucky and the retirement annuities exceed $25,000.

(NON-PERTINENT DEBATE OMITTED)

CHAIRMAN CLARKE: Any further questions? Are you going to ask a question?

Let me say that, this is an issue that we've agonized about. I totally disagree with what Congress did and with the Supreme Court's agreement that Congress could do what they did.

In other words, Congress passed an act that says if you're going to exempt your state and local employees from tax on pension benefits, you have to treat federal retirees the same way. I consider that, personally, a gross invasion of state's rights.

The reason that we exempted state and our teachers and our state employees from taxation is that that was a benefit that they got for having worked on a relatively low scale for many years. And so I thought that was -- I'd rather you didn't keep demonstrating, even if it's when I'm talking.

I don't think that was fair. And I think what Congress did was wrong and I think what the Supreme Court did was wrong in upholding Congress. And we're seeing that more and more. In that the -- the Supreme Court really thinks that the states don't have anymore status. You know, when this Government was formed, I thought that the states had all the authority that wasn't given to the federal government. That's been turned around. But we have that problem and we're trying to deal with it.

Now, it seems to me that the fairest way to deal with this problem -- and we're putting a large tax increase on our citizens generally. It doesn't seem fair to have anyone who has substantial income not to have to pay taxes.

This committee substitute is designed to put taxes on people. And believe me, all of you benefit from the services. Do you really think your entitled to a free ride?

THE GALLERY: Yes.

CHAIRMAN CLARKE: Yes, you do. Okay. Well, I understand that. You know don't tax me. Tax that guy behind the tree. That's --- you know, that's what everybody in the state would really like, in terms of us trying to improve schools, but we can't do that. There isn't anybody out there to tax, but us. In this state, most of us are Bubba. What we got the most of is ordinary people, and ordinary people are the ones who are going to have to pay the tax.

This committee substitute is designed -- hey, don't react, please. I don't want you talking back to me, if you don't mind. Let me say what I'm going to say. I think this is a fair way to deal with a problem. It will cause some of you who have extra income to pay some tax, but you know you get benefits. You are benefitting from all this money that goes into the operational government. You're driving on our roads. You're benefitting from the economic expansion. And, hopefully, we'll all benefit from schools. So I think this is the only fair way.

I know you would prefer not to be taxed, but I think this is a fair way to approach the problem, and I would hope you think of it that way, and agree that -- I'll be willing to sacrifice, too, for the future of the state, because everyone in Kentucky is going to have to sacrifice. We're all sacrificing, and a lot of people aren't going

to be very enthusiastic about it. But I think it's important for the future of the state. And I think this is a fair way to go at this.

Now, a lot of you have written me letters and have said, "I'm going to move away, you know, I'll leave Kentucky, and you won't have anybody in Kentucky."

We found a survey of the states. There are eight states that don't have any income tax, so, obviously, there's no impact there. Eight states have a full exemption. Thirty-three states out of the fifty are more stringent in terms of taxation of retirement benefits than the committee substitute. So you got sixteen states you can move to if you want to, and, if you like, I can give you the list. But I want tell you now that there are states -- most of the states, a great majority of the states, actually have more stringent requirements than this committee substitute.

We have to fund the state's programs and it's very important that we do so. And I don't see any problem with those of you who can afford to, supporting the state's activities.

Virgil.

SENATOR PEARMAN: Mr. Chairman, I know you've worked hard on it, and I respect your opinions, but on the subcommittee (inaudible), we've had a number of studies and we've had a -- and we've paid for couple of those. And what it does -- and I'm -- my concern is if we do this, then we're going to start losing the state retirees and the higher income. And if you notice, we're about to lose the congressional seat. Kentucky has nothing to attract those people to stay in Kentucky after retirement. And that's my big concern.

Now, a comment about those other states that's worse or comparable, whatever. If you look at New York State, they're losing a billion dollars a year to Florida because New York State does not exempt. And I just don't want to get into a situation and pass a Bill here, then we find the state employees starts moving out. I've got a lot of good friends that's got -- they pick up residence in Florida, they come back nine months out of the year. But they don't want to pay no state taxes, because they -- they can get exempt.

So I would hope we'd look at the impact, what's going to happen, and I don't want to hurt our state employees. They have worked for lower salaries and they was promised these benefits. I

agree the court shouldn't -- maybe -- made a decision in that direction because it does hurt state employees. Because they did work for lesser salary and benefits back down through the years.

But I would hope that we'd do something, deal with this once and for all and take a look at it in two to four years and see what effect it has. But, really, I just see more people moving out and leaving us, and I think it will hurt us bad. So --

CHAIRMAN CLARKE: Virgil, New York is one of the states that fully exempts retirement. So that's not why they lost it all.

SENATOR PEARMAN: They just passed that though, didn't they? I believe --

CHAIRMAN CLARKE: When was --- do you know when it was passed? According to our information, they're exempt now. I don't know when it occurred.

SENATOR PEARMAN: Well, that was just -- that was the reason why they passed it.

CHAIRMAN CLARKE: Larry.

(Unidentified Speaker): Mr. Chairman, another scenario that has happened, a lot of the retirees from the private sector, especially in my district, retired from Ford or General Motors, International Harvesters, call me concerned as to how come these people are exempt and I'm not. And I try to explain to them that was part of your employment package and everything else. But I think the $25,000 threshold is fair. In the Governor's tax proposal we got the exemption almost up to 25,000 federal deduction. And for that reason, I'd like to move for the adoption of committee substitute to Senate Bill 4.

CHAIRMAN CLARKE: Is there a second?

I'll second it myself.

If we exempt -- if we believe that all retirement income should be exempt, it's a $100,000 per year price tag for private pensions. Hundred million. I'm sorry. Yes. Thank you.

(NON-PERTINENT DEBATE OMITTED)

SENATOR PEARMAN: Mr. Chairman, Art -- the Senator, Art Schmidt, presented an amendment. And as I said on the Senate floor, that was hard to be against. I understand where the private pensioners are coming from. But we've got a different situation here, you know. You've had a court decision on a national level and on a state level, said you can't treat them differently.

Now, I offered Senator Schmidt, if he would do it, to present a Bill like I have for the last 17 -- 15 years, dealing with that situation. I'd be willing to go along with a half-cent sales tax, and give everybody a chance to have their pension retired -- I mean their retirement pay exempt. But the situation we have here today, we have two court decisions. And what we're going to do, we're going affect our state employees now and give them the incentive to leave us and I just hope we go ahead and deal with what is before us. If somebody wants to come with a Bill and put in a half a cent sales tax to where everybody retires exempt, I'm for that. But, you know, to get up on a floor and offer an amendment at the last minute and not make a preparation to pay for it -- it was $94 million, I think, in the first year, and it went to 97 the second year to exempt everybody.

REPRESENTATIVE FORD: But what I'm looking at, Virgil, we're looking under Senate Bill 4 that it's going to cost $16 to $19 million, okay, which is your Bill. Under the committee substitute, it's only costing the state 2.9 million. And I'm looking at, you know, if we adopted the senate committee substitute and allowed those on private pensions to participate as well, then I don't think it would be that much more costly because we've -- you know, you've reduced the cost of this one by $13 million, if we adopt the senate committee substitute.

SENATOR PEARMAN: Representative Ford, if I could answer that question. Yes, but what it does, it penalizes the higher income retirees and is going to further cause them to leave the state of Kentucky. I understand where your coming from, but --

REPRESENTATIVE FORD: Well, why does it penalize them? The senate committee substitute penalizes them, yes.

SENATOR PEARMAN: Yes.

REPRESENTATIVE FORD: But what I'm saying if we do adopt it, then it would appear to me that we're not costing that much more if we take the other retirees in. Now, if we don't adopt this committee substitute, I agree with you.

SENATOR PEARMAN: But my point is this, real quick. If you keep those retirees in the state of Kentucky -- you talk about going and we spend money to get Toyota -- and I was for that and I'd do it again. It's been great for the state of Kentucky. But those retirees in the state of Kentucky spending their retired dollars here means more than any industry you can get, because they have no impact on your schools, they're spending that money on the economy. I think we don't need to overlook that.

CHAIRMAN CLARKE: Virgil, do you understand that under this committee substitute, 23,000 of -- and I realize your district is a heavy federal impacted district -- 23,000, 63 percent of the federal retirees would pay less than they're paying now under this proposal, and only 5,400 or 15 percent would pay more.

It just doesn't seem unfair to me to have people with substantial incomes doing their part to support government services. That seems like the fairest thing -- I know nobody wants to pay taxes. The people that are going to pay more income taxes and more sales taxes don't like it either. But why shouldn't people with substantial incomes pay a little bit to support Government.

SENATOR PEARMAN: Mr. Chairman, I know where you're coming. But that 5,400 is the ones you're going to lose that's spending their dollars here. Now, I'll admit a lot of the retired people don't have enough money to move out of the state, you know, they're low income, they couldn't get a truck to take them out. But the point is --

CHAIRMAN CLARKE: Well, those people aren't going to be paying anything, because they're going to be below that $25,000.

SENATOR PEARMAN: I understand that.

CHAIRMAN CLARKE: The average income in Kentucky is $20,000.

SENATOR PEARMAN: Mr. Chairman, I understand that. But I just don't want this other group to leave us and I better shut up.

CHAIRMAN CLARKE: Okay. Roger.

REPRESENTATIVE NOE: How long have we exempted state retirees? How long have we been exempting state retirees from the tax laws?

SENATOR PEARMAN: As far as I know, that goes way back and that was exempted -- I can't give you the date.

REPRESENTATIVE NOE: Well, let me ask then, why do we do that? I mean, what was the rational? What is the rationale for exempting state employees now and since '56 or whenever it was?

SENATOR PEARMAN: The supporting of that was is to give an incentive to get good state employees because salaries was not that good and to give them the benefit in retired years. That was the argument I've heard, to give them some incentive to work for state Government.

REPRESENTATIVE NOE: So it's an added benefit? It's --

SENATOR PEARMAN: Exactly.

REPRESENTATIVE NOE: It's a fringe benefit?

SENATOR PEARMAN: To attract good employees.

REPRESENTATIVE NOE: And then, getting back to what you said a few minutes ago, your argument is that the higher income federal employees, if this committee substitute passes, will leave the state in mass, is that your argument?

SENATOR PEARMAN: Okay. We have that -- Representative Noe, we have that already and if you add to that the state employees, I think we're going to have the same effect in state and federal employees. They just won't choose to stay here and spend their dollars.

REPRESENTATIVE NOE: That they're going to sell their homes and leave Kentucky because we added a little bit of progressive tax on them, is that what you're arguing?

SENATOR PEARMAN: My argument is that, yes, some will, but the biggest point is --

REPRESENTATIVE NOE: 5,400? Did you say 5,400?

SENATOR PEARMAN: I believe that was the Chairman's number, that he says is affected under this committee substitute.

REPRESENTATIVE NOE: I just find it hard to believe that 5400 people are going -- who have lived in Kentucky most of their lives are going to put their homes up for sale, abandon their property, abandon their state, because we add a few percentage points to their retirement income. I just find that really difficult to believe.

SENATOR PEARMAN: Representative Noe, I'm not saying you'd lose that whole 5,400, but it would definitely cause Kentucky not to be one of those attractive states to get those retirees to stay here. We have Fort Knox, Fort Campbell, we have a good -- if we get this through, we'll have a good attraction to keep those people here spending their dollars. And we studied that all the way through, and it proves that you can bring those people in. Kentucky is a good place to live, if you exempt them.

(NON-PERTINENT DEBATE OMITTED)

REPRESENTATIVE NETT: Mr. Chairman, would you please let me finish? If you'll look at the motto above us here on the state seal, "United we stand, Divided we fall." Now, all of you all, particularly the teachers, have followed that principle in your school careers. And I see a lot of head nodding. You know the value of what I'm saying. All of us together, all of us in the same boat can move the state forward. When we divide into small groups of self interest, we jeopardize the whole operation. Whether it's building roads, whether it's running schools, whether it's taking care of sick people, whether it's providing respid care for senior citizens in their own homes, all of these services and all of these programs that the state is expected to pay for, somebody has to pay for it.

Now, I've had some good conversations with some people, again, particularly teachers on the telephone. And they are amazed when I say, "Well, what tax would you like to see us to raise to come up with the $19 million?" "Oh, well, why do we have to raise taxes?" And I tell them that we're already short of money. That's why we're contemplating over a billion dollars in new taxes, to pay for the operations of the schools mostly.

Anytime you take $1 and give it away, you have to come up with another dollar and bring it back. Now, all the citizens out there talk about the special interest and the influence they exert on the general assembly. Exempt me, tax somebody else. And I think the people in this group, while you don't like to look at yourself as a special interest, are, in effect, asking us to do the same thing. Take a dollar away from that person and give it to me.

Now, the proposal that the Chairman has suggested, I think, is the best one on the table. I had some other ideas that may go a little different direction, but I think his is the best that's on the table at the present time.

All of the people that have relatively low incomes -- and people who call me say, "I have a very low income. I'm fixed income. I have retirement only." And that's the people that this substitute will help. Those people will be exempt up to $25,000. And that is well above what a lot of people in my district earn while they're working. Now, a lot of people in my district don't have retirements at all.

And I think the only fair tax policy, Mr. Chairman, is to have a broad-based tax system where everybody is expected to pay something.

(NON-PERTINENT DEBATE OMITTED)

APPENDIX E

SENATE RESOLUTION 196

IN SENATE
REGULAR SESSION 1990

FRIDAY, APRIL 13, 1990

Senators Nelson Robert Allen, Virgil Pearman, and John W. Hall introduced the following resolution which was ordered to be printed.

A resolution directing the Legislative Research Commission to study the impact of providing a $20,000 income tax exemption to all retired persons in the Commonwealth.

WHEREAS, it is the intention of the General Assembly and of the Commonwealth to provide fair and equitable treatment through taxation to all retired persons residing in our state; and

WHEREAS, this segment of our population has made and continues to make a valuable contribution to the social and economic fabric of our Commonwealth; and

WHEREAS, the General Assembly took action during this Session that will affect only a portion of those retired persons in our state;

NOW, THEREFORE, Be it resolved by the Senate of the General Assembly of the Commonwealth of Kentucky:

Section 1. That the Legislative Research Commission is hereby directed to study the fiscal and economic development impact of providing a $20,000 income tax exemption for employer-related retirement pay and private annuity income to all retired persons in the state.

Section 2. The report of its findings shall be submitted to the Interim Joint Committee on Appropriations and Revenue no later than September 1, 1991.

Section 3. Staff services to be utilized in completing this study are estimated to cost ten thousand dollars ($10,000).

These staff services shall be provided for from the regular Commission budget and are subject to the limitation and other research responsibilities of the Commission.

APPENDIX F

EXCERPTS FROM STUDY ON THE COST OF EXEMPTING PRIVATE EMPLOYER RETIREMENT INCOME FROM STATE TAXATION PREPARED BY KENTUCKY'S LEGISLATIVE RESEARCH COMMISSION

The Legislative Research Commission was directed by 1990 Senate Resolution 196 to study the fiscal and economic development impacts of providing an exemption from state taxation for private employer retirement income, with the results to be reported to the Interim Joint Committee on Appropriations and Revenue. Due to an absence of data, the study was limited only to the fiscal (revenue) effects of the exemption, but was expanded to include all retirement pay, both private and public. The results are hereby transmitted.

AN ANALYSIS OF THE FISCAL IMPACT OF PROVIDING AN INCOME TAX EXEMPTION FOR RETIREMENT PLAN INCOME

INTRODUCTION

Senate Resolution 196, adopted by the Senate during the 1990 Regular Session of the General Assembly, directed the Legislative Research Commission to study the impact of providing a $20,000 income tax exemption to all retired persons living in Kentucky. The study request was prompted by the enactment of Senate Bill 4 during the 1990 Session, which fully exempted Federal retirement plan income, as well as income from a few remaining local public employee retirement plans, from state income taxation.

Senate Bill 4 was enacted in response to the 1989 decision of the United States Supreme Court in Davis v. Michigan, in which the Court held that the constitutional doctrine of intergovernmental tax immunity and the Public Salary Tax Act of 1939 prevents a state from taxing retirement benefits received by federal civil service retirees differently than it taxes retirement benefits received by state and local retirees. At the time Davis

was decided, Kentucky was one of 24 states that offered a more attractive income tax exemption to retired state employees than that offered to retired federal employees. Retirement benefits received by state and local retirees were, in most cases, fully exempt from the imposition of Kentucky income tax, while retirement benefits received by federal and military employees were only partially exempt.

This study examines the cost of providing an income tax exemption for pensions under two different scenarios. The first scenario, hereinafter referred to as the "absolute amount" scenario, considers the cost of providing an absolute exemption for pension income beginning with an exemption of $5,000 and increasing in $5,000 increments to an exemption of $30,000. The cost of providing a total exemption of pension income is also included. This scenario is illustrated in Table 1.

EXCERPTS FROM TABLE 1.

State Pensions	Annual Tax Revenues
Revenue Value of Full Exemption	$6,641,000
Federal Pensions	
Revenue Value of Full Exemption	$17,302,000
Private Pensions	
Revenue Value of Full Exemption	$52,327,000

APPENDIX G

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U. S. Const. amend. XIV, Section 1 provides:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

4 U.S.C. Section 111, provides:

"The United States consents to the taxation of pay or compensation for personal service as an officer or employee of the United States. . .by a duly constituted taxing authority having jurisdiction, if the taxation does not discriminate against the officer or employee because of the source of the pay or compensation."

KENTUCKY REVISED STATUTES

KRS 141.010: Definitions

"As used in this Chapter. . .(a) "gross income. . .means 'gross income' as defined in Section 61 of the Internal Revenue Code, adjusted as follows. . ."

KRS 141.021. Federal and local government annuities excluded from gross income. -- Notwithstanding the provisions of KRS 141.010, federal retirement annuities and local government retirement annuities paid pursuant to KRS 67A.320, 67A.340, 67A.360 to 67A.690, 79.080, 90.400, 90.410, 95.290, 95.520 to 95.620, 95.621 to 95.629, 95.767 to 95.784, 95.851 or 95.884 or 96.180, shall be excluded from gross income. (Effective July 13, 1990)

KRS 141.235. Action interfering with collection or payment prohibited; limitation on refund of taxes.

(1) No suit shall be maintained in any court to restrain or delay the collection or payment of the tax levied by this chapter.